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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

***James H. Quello, Chairman**

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*Commissioner Quello designated as Chairman effective February 5, 1993.
**Commissioner Marshall resigned effective April 30, 1993.

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Request for Extension of Time for Special Temporary Relief 6160
Sarasota-Charlotte (Englewood FL) CP FM MM 88-538 FCC 93-408 6278

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Jody Barnes File No. 1119-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service station on the E-group
channels at Greenville, South Carolina

ORDER ON RECONSIDERATION

Adopted: August 13, 1993; Released: August 23, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Jody Barnes (Barnes) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of her application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Greenville, South Carolina.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of the application, pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Barnes was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of her application would serve the public interest. Barnes was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] In the deficiency letter, Barnes was also advised that failure to file the requested information within thirty days could result in the dismissal of her application.

3. Almost two years after Barnes had been notified of these deficiencies, she still had not provided all of the requested information. Pursuant to Sections 21.13(c), 21.20(d), and 21.28(d), the Division dismissed Barnes' application for failure to comply completely in a timely manner with the Division's request for information. On reconsideration, Barnes indicates that she filed (1) some of the requested information approximately one month after the response date specified in the deficiency letter; (2) an option agreement for a new site approximately eleven months after the specified response date; and (3) an option agreement and interference analysis for her originally proposed site concurrently with the petition for reconsideration. Barnes explains that the initial delay in filing the option agreement and interference analysis was due to her decision to try to co-locate her station with another proposed MMDS facility at Greenville. She also indicates that approximately three months after filing the option agreement some confusion arose regarding the correct coordinates (allegedly due, in part, to problems with a Commission data base)[2] which resulted in further delay in filing the interference analysis. Barnes indicates that after receiving the dismissal letter, she abandoned her attempt to co-locate the station, filed an option agreement and interference analysis for her originally proposed site, and has now filed all of the requested information. Barnes argues that under Section 21.902(i), the Commission is not bound by a fixed deadline for submission of the interference analysis. She also argues that she has worked assiduously to perfect her application, that the delay in filing the interference analysis was partly due to factors beyond her control, and that the Commission should take the equities here into account. Finally, Barnes argues that reinstatement would serve the public interest because she will provide service expeditiously, while the process of choosing a new tentative selectee could result in years of further delay.[3]

4. *Discussion.* Barnes filed none of the required information within the thirty day period specified in the deficiency letter, and, as of the date of the Division's dismissal action, still had not submitted all the information necessary for evaluation of her qualifications to be an MMDS licensee at Greenville. In particular, Barnes failed to comply with the request to submit the Section 21.902(i) ITFS interference analysis. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an ITFS interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Barnes failed to do so. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

5. Barnes had a duty to submit curative amendments to her application within thirty days of the Division's written request, or to obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Barnes failure to correct the defects in her application for almost two years substantially impeded the expeditious offering of MMDS at Greenville. Also, Barnes' failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Barnes had not provided the required interference

[1] Some of the deficiencies cited were the absence of: (1) a certification of financial qualifications, pursuant to 47 C.F.R. Sec. 21.17; (2) a non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; (3) an Instructional Television Fixed Service (ITFS) interference analysis, pursuant to 47 C.F.R. Sec. 21.902(i); and (4) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a).

[2] Barnes alleges that there were discrepancies in a data base of tower coordinates maintained by the Commission's Antenna Survey Branch.

[3] Barnes states that she has entered into an agreement with a company that worked aggressively to develop MMDS systems in several other markets, and that by reinstating Barnes application the Commission can be assured the Greenville market will also be developed expeditiously.

analysis.[4] The Division was not in a position, therefore, to complete evaluation of Barnes' MMDS station proposals and her qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

6. *Conclusion and Ordering Clause.* Having carefully considered all of the arguments and evidence presented, we find that dismissal of this application for failure to comply with the Division's request for information was proper, reconsideration of the action is not warranted, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Jody Barnes regarding the above-referenced MMDS application IS DENIED.[5] This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[4] Barnes argues that the delay was partly due to factors beyond her control, that she has worked assiduously to perfect her application, and that equitable considerations should be taken into account. However, we note that Barnes (1) was advised in the deficiency letter that failure to file the requested information within thirty days could result in dismissal of the application; (2) failed to submit any of the requested information within the thirty day period; (3) never filed a request for an extension of time; and (4) allowed her application to remain unperfected for almost two years. Under these circumstances, we do not find that equitable considerations justify reinstatement.

[5] Also pending before the Commission are (1) a letter from the South Carolina Educational Television Commission (SCETV) objecting to grant of Barnes' application; and (2) an emergency motion for stay by Barnes requesting that there be no re-lottery of the Greenville market until her appeal has been resolved. Because Barnes' application has been dismissed, and her petition for reconsideration denied, SCETV's objection and Barnes' motion are both dismissed as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-101

In the Matter of

Amendment of Section 73.202(b),	RM-8201
Table of Allotments,	
FM Broadcast Stations	
(Pelham, Georgia)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 3, 1993; Released: August 23, 1993

By the Chief, Allocations Branch:

1. Pursuant to the request of Mitchell County Television ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 2811 (1993), proposing the allotment of Channel 222A to Pelham, Georgia, as that community's first local aural transmission service.[1] Petitioner filed comments restating its intention to apply for Channel 222A, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 222A to Pelham, since it could provide a first local aural transmission service to that community. As indicated in the *Notice*, Channel 222A can be allotted to Pelham in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.8 kilometers (1.8 miles) south[2] in order to avoid a short-spacing to Station WAZE(FM), Channel 221A, Dawson, Georgia, and Station WDDQ(FM), Channel 221A, Adel, Georgia.

3. Accordingly, pursuant to the authority contained in Sections (4i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 7, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Pelham, Georgia	222A

4. The window period for filing applications will open on **October 8, 1993,** and close on **November 8, 1993**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In response to the *Notice*, petitioner provided an affidavit verifying the information contained in its petition for rule making.

[2] The coordinates for Channel 222A at Pelham are North Latitude 31-06-07 and West Longitude 84-08-44.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

MM Docket No. 93-146

In the Matter of

Amendment of Section 73.202(b), RM-8231
Table of Allotments,
FM Broadcast Stations.
(Potts Camp, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 4, 1993; Released: August 23, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 3708 (1993), issued in response to a petition filed by Potts Camp Broadcasting ("petitioner"). The *Notice* proposed the allotment of Channel 240A to Potts Camp, Mississippi, as that community's first local broadcast service. Petitioner filed comments reaffirming its interest in the allotment of Channel 240A at Potts Camp. No other comments were received.

2. We believe the public interest will be served by allotting Channel 240A to Potts Camp, Mississippi, as it will provide the community with its first local broadcast service. Channel 240A can be allotted to Potts Camp consistent with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 6.1 kilometers (3.8 miles) south of the community.[1] The site restriction will prevent short spacings to Channel 239A, Station WYYA, Olive Branch, Mississippi, and to Channel 240A, Station WFKX, Henderson, Tennessee.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 7, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Potts Camp, Mississippi	240A

4. The window period for filing applications will open on **October 8, 1993,** and close on **November 8, 1993**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

[1] The coordinates for Channel 240A at Potts Camp are 34-35-39 and 89-19-33.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-118

In the Matter of

Amendment of Section 73.202(b), RM-8219
Table of Allotments,
FM Broadcast Stations.
(Trenton, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 4, 1993; Released: August 23, 1993

By the Chief, Allocations Branch:

1. At the request of Robert D. Fogel, personal representative of the Estate of William H. Burckhalter, licensee of Station WCWB(FM), Channel 269A, Trenton, Florida ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 2951 (1993), proposing the substitution of Channel 269C2 for Channel 269A at Trenton, Florida, and modification of Station WCWB(FM)'s license to specify operation on the higher class channel. Petitioner filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 269C2 for Channel 269A at Trenton, Florida, as it would provide the community with a wide coverage area FM service. Channel 269C2 can be allotted to Trenton in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 27.4 kilometers (17 miles) southwest at petitioner's desired transmitter site.[1] In accordance with Section 1.420(g) of the Commission's Rules, we will modify petitioner's license for Station WCWB(FM) to specify operation on Channel 269C2 at Trenton, Florida.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 7, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Trenton, Florida	269C2

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WCWB(FM), Channel 269A, Trenton, Florida, IS MODIFIED, to specify operation on Channel 269C2 in lieu of Channel 269A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Robert D. Fogel, personal representative of the Estate of William H. Burckhalter, licensee of Station WCWB(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 269C2 at Trenton are North Latitude 29-35-00 and West Longitude 83-05-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-571

In the Matter of

TELECOMMUNICATIONS RELAY SERVICES, AND THE AMERICANS WITH DISABILITIES ACT OF 1990

MEMORANDUM OPINION AND ORDER

Adopted: August 13, 1993; Released: August 24, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address the Request for Extension of Time for Special Temporary Relief ("Request") filed by Southwestern Bell Telephone Company ("SWBT") on July 26, 1993. For the reasons discussed below, we dismiss the Request on procedural grounds.

II. BACKGROUND

2. On July 26, 1990, Congress enacted the Americans with Disabilities Act of 1990 ("ADA").[1] The purpose of the ADA is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, and to ensure that federal entities, such as the Federal Communications Commission, play an active role in enforcing the standards established in the ADA on behalf of individuals with disabilities. Specifically, Title IV of the ADA, codified in Section 225 of the Communications Act of 1934, as amended, ("the Act"),[2] mandates that the Commission ensure that interstate and intrastate telecommunications relay services[3] are available, to the extent possible and in the most efficient manner, to individuals in the United States with hearing and speech disabilities.[4] The intent of Section 225 is to further the Act's goal of universal service by providing telephone services to hearing-impaired or speech-impaired individuals that are functionally equivalent to those provided to individuals without hearing or speech disabilities.

3. To fulfill the ADA's mandate, the Commission has promulgated rules to implement the provisions of Section 225 of the Act.[5] Section 225 of the Act and the Commission's rules require each common carrier providing telephone voice transmission to provide, by July 26, 1993, TRS within its service area individually, through designees, through a competitively selected vendor, or in concert with other carriers.[6] In addition, Section 225 of the Act and the Commission's rules provide detailed procedures for Commission certification for states desiring to establish a program under Section 225.[7] The rules establish an October 1, 1992 deadline for the submission of an application and supporting documentation for state program certification.[8] The rules direct the Commission to certify the state program if the program meets certain requirements set forth in Section 64.604 of the Commission's rules.[9]

4. In its Request filed with the Commission on July 26, 1993, SWBT asks the Commission to extend the Act's deadline in which to implement a TRS system that complies with the Commission's minimum standards by 150 days from the date of the grant of the extension. SWBT explains that a 150 day extension is necessary because it "did not learn until on or about June 28, 1993" of the problems with the State of Oklahoma's certification application and Oklahoma's implementation plans.[10] Further, SWBT states that the extension is necessary because (1) to provide TRS on such short notice, SWBT must use its TRS

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[1] Americans with Disabilities Act of 1990, Pub L. 101-336, 104 Stat. 327, 366-369 (1990).

[2] 47 U.S.C. § 225.

[3] Telecommunications relay services ("TRS") are defined as telephone transmission services that provide the ability for an individual who has a hearing or speech disability to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing or speech disability to communicate using voice communication services by wire or radio. Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Report and Order and Request for Comments, 6 FCC Rcd 4657 n.1 (1991) (Report and Order), *recon. granted in part*, 8 FCC Rcd 1802 (1993). This term includes services that enable communications between the user of a Text Telephone ("TT") or other non-voice terminal device and an individual who does not use such a device. *Id.*

[4] 47 U.S.C. § 225(b)(1).

[5] Report and Order, 6 FCC Rcd 4657, 4667-71.

[6] 47 U.S.C. § 225(c); 47 C.F.R. § 64.603.

[7] 47 U.S.C. § 225(f); 47 C.F.R. § 64.605.

[8] 47 C.F.R. § 64.605(a).

[9] 47 C.F.R. § 64.605(b).

[10] Request at 3. Pursuant to Section 225 and the Commission's rules, the State of Oklahoma, through its Department of Human Services ("DHS") filed an application for certification of a TRS system with the Commission on or about October 1, 1992. By letter dated May 11, 1993, the Commission acknowledged the filing and requested further certification and documentation of certain mandatory minimum standards required by the rules. Letter from James R. Keegan, Chief, Domestic Facilities Div., Common Carrier Bureau, FCC to A.C. Adams, Rehabilitation Services Div., DHS (May 11, 1993). In mid-June, 1993, the DHS notified the Commission that the newly-created Department of Rehabilitation Services ("DRS") would be responsible for TRS for the State. The DHS also informed the Commission that it was having a serious problem funding the TRS and requested that the Commission suspend its consideration of the certification application pending the approval of additional funding by the Oklahoma Legislature. Because of insufficient funding, the DHS stated that after July 25, 1993, it would no longer operate the TRS. Finally, the DHS stated that it would inform the carriers operating in the state of the situation. *See* Letter from Jerry Dunlap, Administrator, Rehabilitation Services Div., DHS to Linda Dubroof, Director, TRS Implementation, Domestic Facilities Div., Common Carrier Bureau, FCC (June 18, 1993). On July 19, 1993, the DRS asked the Commission to extend the certification application deadline from October 1, 1992 to July 1, 1994. Letter from Jerry Dunlap, Director, Dep't of Rehabilitation Services to Linda Dubroof, Director, TRS Implementation, Domestic Facilities Div., Common Carrier Bureau, FCC (July 19, 1993).

facility located in Lawrence, Kansas; (2) it must purchase additional equipment to allow the termination of additional circuits in the Kansas center; (3) it must hire and train additional communications assistants ("CAs") for the Kansas center to accommodate the increased voice traffic originating or terminating in Oklahoma; (4) SWBT must purchase and install new equipment for the new CAs; (5) SWBT must establish new 800 numbers and circuits to connect the Oklahoma numbering plan areas ("NPAs") to the Kansas center; and (6) SWBT must establish foreign exchange ("FX") circuits from the Kansas center to Oklahoma City and Tulsa for the completion of TRS calls.[11]

III. DISCUSSION

5. As mentioned above, by including Title IV in the ADA, Congress' intent was clear -- to further the Communications Act's goal of universal service by providing to individuals with hearing or speech disabilities telephone services that are functionally equivalent to those provided to individuals without hearing or speech disabilities. To prevent delay and ensure universal service to individuals with hearing or speech disabilities, Congress established a deadline for carriers by which they must provide TRS in compliance with the Act. The Commission's rules codify that statutory deadline.[12] SWBT now requests that the Commission extend the July 26, 1993 statutory deadline. Where Congress has established a statutory deadline, this Commission does not extend or waive such deadline absent extraordinary circumstances that are not present here.[13] Therefore, we dismiss SWBT's Request for Extension of Time for Special Temporary Relief.

IV. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 225 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 225, and authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Request for Extension of Time for Special Temporary Relief filed by Southwestern Bell Telephone Company on July 26, 1993 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

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[11] Request at 4.

[12] *See* 47 C.F.R. § 64.603.

[13] *See* Virgin Island Tel. Corp., 7 FCC Rcd 4238 (1992), citing *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976) (*Gardner*); Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Util. Elec. Co., 7 FCC Rcd 4192, 4193 (1992), citing *Gardner*; Richardson Indep. School Dist., 5 FCC Rcd 3135 (1990), citing *Gardner, vacated and remanded on other grounds sub nom. WLOS-TV, Inc. v. FCC*, 932 F.2d 993 (D.C. Cir. 1991); Mary R. Krupis, 5 FCC Rcd 5142 (1990), citing *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Applications of

CENTEL CORPORATION,
Transferor,

and

SPRINT CORPORATION,
and F W Sub Inc.,
Transferees,

File No. 08374-CL-TC-1-92 et al.

For Consent to the Transfer of
Control of Authorizations in the
Domestic Public Cellular Radio Service
and Other Common Carrier Services.

MEMORANDUM OPINION AND ORDER

Adopted: August 12, 1993; Released: August 24, 1993

By the Commission:

I. INTRODUCTION

1. In this order, we address an Application for Review filed by American Message Centers (AMC). AMC asks us to review and rescind an order issued by the Chief, Common Carrier Bureau (Bureau), that granted applications filed by Sprint Corporation (Sprint) and Centel Corporation (Centel) in the above-captioned proceedings.[1] In addition, AMC seeks an order designating the subject transfer of control applications for an evidentiary hearing to determine whether, in light of alleged misrepresentations, lack of candor, and violations of our *ex parte* rules, Sprint possesses the character qualifications to be a licensee of this Commission.[2] For reasons discussed below, we deny AMC's Application for Review.[3]

II. BACKGROUND

2. In September 1991, AMC filed formal complaints pursuant to Section 208(a) of the Communications Act[4] against Sprint and Telecom Management Services (TMS), a common carrier reseller of Sprint services.[5] The complaints alleged that TMS had charged AMC approximately $160,000 for unauthorized or fraudulent telephone calls. On April 6, 1992, the complaint against TMS was dismissed with prejudice on the basis of a settlement AMC and TMS had reached.[6] On November 19, 1992, AMC filed a request for sanctions alleging that Sprint had made false or misleading statements to the Commission and failed to adhere to Commission rules pertaining to discovery and formal complaint pleading requirements. On November 25, 1992, AMC filed a Petition to Deny (Petition) the instant Sprint/Centel transfer of control applications alleging, as it had in its request for sanctions, that Sprint misrepresented the facts in the formal complaint proceeding with respect to payments it had received from its customer, TMS. In addition, AMC stated that it filed its Petition because of frustration with what it perceived to be unwarranted delays in obtaining discovery for its complaint against Sprint.[7] The Applicants maintained that AMC failed to establish standing as a "party in interest" as required to file a Section 309(d)(1) petition. The *Bureau Order* denied AMC's request for an evidentiary hearing because AMC had failed to raise a substantial and material question of fact as required by Section 309(d)(1) of the Act[8] without reaching the issue of standing.[9]

3. In its Application for Review, AMC contends that the Bureau erroneously granted the transfer applications by disposing of an "issue that AMC had not clearly raised," to wit: whether Sprint knew that certain representations it made in the complaint proceeding were false or incomplete.[10] Furthermore, AMC states that the Bureau disposed of the issue on grounds not asserted by Sprint. According to AMC, the Bureau erroneously found that AMC failed to rebut an explanation made by Sprint regarding payments for disputed calls when, in fact, Sprint never offered the explanation as stated by the Bureau.[11] Consequently, AMC claims it was denied a hearing because it failed to rebut an explanation that was never made, or at least "never heard" by AMC.[12] In addition, AMC claims, the Bureau erred because it did not compel discovery in the proceeding involving AMC's complaint against Sprint and yet, in the instant matter involving the transfer applications, ruled that AMC had not provided the records that it had unsuccessfully sought through discovery.[13]

4. The proceeding involving the instant transfer applications became a restricted proceeding within the meaning of our *ex parte* rules once AMC filed a formal pleading

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[1] Memorandum Opinion and Order, 8 FCC Rcd 1829 (Com. Car. Bur. 1993) (*Bureau Order*). Grant of the subject applications was necessary before a proposed merger of Centel and Sprint (Applicants) could be effected. The *Bureau Order* was adopted and released on March 4, 1993, and the merger was consummated on March 9, 1993.

[2] Application for Review, filed April 5, 1993, at 15.

[3] On June 28, 1993, AMC filed a separate application for review in which it asked us to rescind a May 27 Order by the Bureau dismissing a request for stay pending review. In view of our action herein affirming the Bureau's grant of the subject applications as in the public interest, we dismiss as moot AMC's application for review regarding the stay request.

[4] 47 U.S.C. § 208(a).

[5] American Message Centers v. Telecom Management Services, File No. E-91-115, *dismissed with prejudice*, 7 FCC Rcd 2250 (Enf. Div., Com. Car. Bur. 1992); American Message Centers v. Sprint Corporation, File No. E-91-116 (Sept. 17, 1991), *petition for writ of mandamus pending* (D.C. Cir. No. 93-1275, filed Apr. 19, 1993).

[6] *Id.* 7 FCC Rcd 2250.

[7] Application for Review at 4.

[8] *Bureau Order*, 8 FCC Rcd at 1832.

[9] *Id.* at n.38.

[10] Application for Review at 11.

[11] *Id.* at 11-12.

[12] *Id.* at 12.

[13] *Id.* at 13.

opposing grant of the applications.[14] AMC has raised allegations in its Application for Review, correspondence to the Managing Director, and subsequent pleadings that Sprint violated the Commission's *ex parte* rules by making prohibited *ex parte* contacts.[15]

III. DISCUSSION

Standing

5. We have stated that in transfer of license proceedings, as here, "a party does not have standing unless it can establish that a grant of the application complained of would result in, or be reasonably likely to result in, some injury of a direct, tangible, or substantial nature." (citations omitted)[16] AMC's Petition failed to show how grant of the instant transfer of control applications would result in such injury to AMC. AMC's rights to relief against Sprint, if any, as the result of its formal complaint are independent of and unaffected by the action taken on the instant transfer of control applications. We find that AMC has not demonstrated standing to file its Petition. Nevertheless, pursuant to the Bureau's October 26, 1992 public notice that solicited comments in this matter,[17] we will treat AMC's Petition as timely-filed comments and consider AMC's claims on their merits.

Necessity for Evidentiary Hearing

6. AMC contends that the Bureau erred by denying its request that Sprint's applications be designated for a trial-type hearing to determine whether Sprint possesses the requisite qualifications to be a Commission licensee.[18] The bases of AMC's request were its allegations that Sprint had made material misrepresentations and displayed lack of candor in the proceeding on AMC's formal complaint. According to AMC, the Bureau erroneously concluded that AMC's allegations of misrepresentation and lack of candor failed to raise a substantial and material question of fact requiring an evidentiary hearing. We have carefully examined the record of this proceeding and find no reason to disturb the result of the Bureau's ruling. The Bureau applied the two-prong test established in Sections 309(d)(1) and (d)(2) of the Act to AMC's hearing request[19] and found that, in light of all the materials in the record, there were no substantial and material question of fact on this issue.[20] AMC has presented no evidence or arguments on review that would persuade us to alter the Bureau's determination that no hearing on Sprint's character qualifications was required. We need not address in detail here the Bureau's analysis of AMC's allegations regarding Sprint's statements in the complaint proceeding. In an order adopted August 6, 1993 resolving the complaint, we independently reviewed Sprint's statements, and the context in which they were made, and determined that AMC's allegations did not raise a substantial and material question of fact suggesting misrepresentation or lack of candor that would call into question Sprint's qualifications to be a Commission licensee.[21] Accordingly, for the reasons set forth in that order, we deny the Application for Review on this point.

Ex Parte Presentations and Contacts

7. The gravamen of AMC's concerns regarding alleged violations of our *ex parte* rules concern: (1) the failure of Sprint to serve on AMC or other parties copies of two January 15, 1993 letters;[22] (2) the failure of Sprint to provide copies of court orders that were provided pursuant to staff request;[23] and (3) possible inquiries made by Sprint relating to the timing of the Commission's action on the proposed transfer applications. For the reasons given below, we conclude that while Sprint did not comply with the *ex parte* requirements applicable to this restricted proceeding, *see* 47 C.F.R. §1.1208, its failure to do so does not warrant reversal of the Bureau's approval of the transfer applications or imposition of sanctions.

8. As an initial matter, we note that the staff's *ex parte* requests for information regarding any cross-block cellular interests and for copies of court orders were permissible under our rules.[24] However, Sprint's failure to serve the January 15 response to AMC's supplemental pleading violated section 1.1208. Nevertheless, it appears that this violation was inadvertent, as Sprint explains that it fully intended to serve AMC and believed that it had done so.[25] In addition, because Sprint promptly provided copies to the parties once it was informed that they had not received them, which was well before the Bureau decision, no prejudice resulted from this unintentional violation of the rules. Sprint's failure to serve copies of the information requested by the staff regarding cross-block cellular inter-

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[14] *See* 47 C.F.R. §§ 1.1208(c)(1)(i)(B), 1.1202(e).

[15] On March 15, 1993, AMC filed a letter addressed to the Managing Director, in which it alleged that *ex parte* violations had occurred. The Managing Director referred AMC's letter, along with responsive letters by Sprint and AMC, to us for consideration in this proceeding.

[16] Teleprompter Corporation, 87 FCC 2d 531, 537 (1981), *aff'd*, 89 FCC 2d 417 (1982).

[17] Public Notice, Mimeo No. 30278, Report No. CL-93-16 (Oct. 26, 1992).

[18] *See* Application for Review at 14.

[19] *See Bureau Order* at 1831, citing Astroline Communications Company Limited Partnership v. FCC, 857 F.2d 1556, 1557 (D.C. Cir. 1988). Under the two-prong test, the petitioning party must present "specific allegations of fact sufficient to show ... that grant of the application would be prima facie inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. § 309(d)(1). If such prima facie showing is made, the Commission must then determine whether, "on the basis of the application, the pleadings filed, or other matters which it may officially notice[,]...a substantial and material question of fact is presented." 47 U.S.C. § 309(d)(2).

[20] *Bureau Order*, 8 FCC Rcd at 1832.

[21] American Message Centers v. Sprint Communications Co., *Memorandum Opinion and Order*, FCC 93-388, at para. 20.

[22] One letter responded to a specific information request by FCC staff for information on whether any cross-block cellular interests would be created by a Sprint-Centel merger. The other consisted of a joint response by Sprint and Centel to a supplemental pleading made by AMC.

[23] The staff requested copies of the court orders referred to in paragraph 9, *infra*.

[24] Section 1.1204(b)(7) of our rules provides that presentations requested by Commission staff for clarification or adduction of evidence or resolution of issues in a restricted proceeding which has not been designated for hearing, as here, are exempt from the prohibitions and requirements of the *ex parte* rules, provided that any new information is served on the parties of record.

[25] *See* Letter, dated January 29, 1993, from Nancy J. Victory, Esq. to John Cimko, Chief, Mobile Services Division, stating that copies of the January 15, 1993 letter were mailed to counsel for all parties, as indicated by the fact that the letters showed service.

ests also violated section 1.1208. *See also* 47 C.F.R. §1.1204(b)(7) Note. Again, we are persuaded that the failure to serve was apparently unintentional as indicated by the fact that the letter showed service. Moreover, while the existence of this letter was not disclosed prior to the Bureau's decision, the information in this letter did not relate to the issues raised by AMC in its petition to deny. In addition, AMC has not subsequently alleged that this particular information raised any issues regarding the grant. Thus, it does not appear that AMC's ability to fully and fairly present arguments regarding the issues in its petition was prejudiced by the lack of service.

9. With respect to the January 20, 1993 order from a bankruptcy court dismissing a proceeding involving Centel and Francesco Galesi and the February 26, 1993 order from a federal district court dismissing a suit brought by Galesi against Centel, we have never explicitly ruled on whether the filing of documents that are matters of public record of which the Commission may take official notice, *see* 47 U.S.C. §309(d)(2), must be served in a restricted proceeding if they relate to the merits of the proceeding. We now clarify that such documents should be served.[26] However, we recognize that Sprint may have reasonably believed that such information was not within the scope of the *ex parte* rules, and, in this circumstance, we do not think sanctions are warranted. Moreover, we also conclude that AMC was not prejudiced by Sprint's failure to serve these documents. The court orders were a matter of public record and did not relate to the merits of AMC's petition. It therefore does not appear that AMC was prejudiced.[27]

10. Finally, AMC alleges that Sprint may have made *ex parte* contacts by urging that the Bureau's action on the Sprint/Centel transfer applications take place by March 9, 1993. In this regard, AMC notes that the Bureau approved the applications on March 4, 1993, shortly before the March 9, 1993 planned date for consummation of the merger arrangement. Although AMC acknowledges that an expected March 9, 1993 closing date for the Sprint/Centel merger had been widely reported in newspaper accounts and in the trade press, it apparently believes that, absent urging by Sprint, the Bureau would not have acted by the March 9 date. AMC thus suggests that the Bureau acted by March 9 to accommodate Applicants. Sprint responds that no *ex parte* violations occurred. Rather, Sprint states that the "Commission staff was asked whether a decision would be rendered prior to the targeted March 9, 1993 closing date, which had been selected because it would preclude a need for duplicative shareholder meetings."[28] Sprint further stated that it also inquired whether such action would be taken by the Commission or by the Bureau on delegated authority. In Sprint's view, these communications were status inquiries, permissible under the *ex parte* rules.[29]

11. The Commission's *ex parte* prohibition for restricted proceedings applies to any status inquiry "which states why timing is important to a particular party, or which in any other manner is intended as a means, direct or indirect, to address the merits or outcome, or influence the timing, of a proceeding." *See* 47 C.F.R. §§1.1202(a), 1.1208(a). However, *ex parte* communications "expressing concern with administrative delay in a particular proceeding or expressing concern that a proceeding be resolved expeditiously" are permissible provided that "no view is expressed as to a date by which the proceeding should be resolved" and "no specific reasons are given as to why the proceeding should be resolved expeditiously, other than the need to resolve administrative delay." 47 C.F.R. §1.1202(a) Note. Also permissible are *ex parte* requests for information concerning "when the matter is likely to be decided" as well as "inquiries regarding whether a matter is to be decided by the full Commission or by delegated authority." *See Report and Order in Gen. Docket No. 86-225*, 2 FCC Rcd 3011, 3013, *recon. in part*, 2 FCC Rcd 6053 (1987).

12. At the outset, Sprint's question whether action would be taken by the Commission or by the Bureau on delegated authority was clearly permissible. *See* 2 FCC Rcd at 3013. We conclude, however, that Sprint's inquiry on whether action would be taken on the transfer actions prior to the March 9 planned merger date, when combined with its explanation of why it chose the closing date, did violate the *ex parte* rules. If Sprint's inquiry had been limited to the question of when action was likely to be taken, or even simply whether action was likely before March 9, it would have been a permissible status inquiry. However, because Sprint's inquiry also explained the significance of the March 9 date (the planned closing) and included an explanation for the closing date chosen (to avoid need for duplicative shareholder action), we conclude that Sprint's inquiry was not a permissible status inquiry. It is difficult to see what purpose Sprint could have had in explaining the significance of the March 9 date other than attempting to influence, at least indirectly, the timing of the decision. The fact that the planned merger was publicly announced, widely reported in the trade press, or may have been known by the staff prior to Sprint's inquiries does not alter this conclusion.[30]

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[26] We also reject AMC's attempt to portray Sprint's failure to serve copies of the staff-requested court orders as "surreptitious" in nature because Sprint's submissions were not accompanied, and therefore evidenced, by transmittal letters. Transmittal letters are not required as long as the underlying document is served on the parties. Of course, transmittal letters that accompany submissions made to the Commission and that address the merits of a restricted proceeding should be served on the other parties to the proceeding. Service of transmittal letters on other parties, however, is not required where they merely state that the attached is a courtesy copy of a submission formally filed with the Commission. Here, the requested copies of the court orders were transmitted by telecopier, including a cover transmittal page which clearly identified the sender, recipients and time of transmission, and which have been included as part of the official record.

[27] Moreover, we note that AMC was informed by letter dated February 22, 1993, that the federal district court litigation had been settled. *See* Letter from John T. Scott, III, attorney for Francesco Galesi, to Donna R. Searcy, dated February 22, 1993. Indeed, on February 24, 1993, AMC filed a response to Galesi's request for withdrawal of the comments that he made in the February 22 letter. In this response, AMC urged the Commission to consider Galesi's comments as still pending until formally dismissed by the Commission or withdrawn in accordance with Section 22.927 of our Rules. In view of the fact that the *Bureau Order* effectively granted AMC's request by formally denying Galesi's request, (see *Bureau Order*, 8 FCC Rcd at 1833), we do not believe that AMC was prejudiced.

[28] Letter from R. Michael Senkowski to Donna R. Searcy, dated April 26, 1993, at 2.

[29] Our rules expressly exclude from prohibited *ex parte* presentations communications that are inquiries or requests for information relating solely to the status of a proceeding or that are "inadvertently or casually made." 47 C.F.R. § 1.1202(a).

[30] We note that the staff was independently aware of the signifi-

13. As with the question of service of documents of which the Commission may take official notice, we recognize that Sprint may have believed that the making of such communication on an *ex parte* basis was not impermissible under our *ex parte* rules in these particular circumstances. Indeed, in this regard, we note that the staff receiving Sprint's inquiry did not realize the inquiry may have violated the rules and, for this reason, did not report it to the Managing Director pursuant to section 1.1212 of the Rules.[31] Under these circumstances, we decline to impose sanctions on Sprint for this violation. Nor shall we undo the transaction. Even assuming that Sprint's inquiry affected the timing, we conclude that the transaction should result in improved services and increased competitiveness in the telecommunications marketplace and therefore serves the public interest.

14. Finally, we also do not believe this violation, even when combined with the other violations discussed above, raises a substantial and material question of fact regarding Sprint's qualifications to be a licensee. Two of the violations, involving the January 15 letters, appear to have been inadvertent and the others relate to areas where we had not previously clearly interpreted our rules. Accordingly, we do not believe the *ex parte* violations are disqualifying. *See, e.g., Pepper Schultz*, 4 FCC Rcd 6393, 6403 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 3273 (1990). We also find no substantial and material questions of fact regarding Sprint's candor on this issue. Sprint responded to all the questions raised regarding *ex parte* violations -- indeed, it is Sprint's responses that led us to conclude that it violated the rules. We do, however, strongly admonish Sprint to comply with the *ex parte* rules more carefully in the future. Should future violations by Sprint come to our attention, we will take appropriate enforcement action. We further caution that where uncertainty exists concerning the *ex parte* rules' applicability, parties should seek guidance from the Commission.

IV. CONCLUSION

15. In light of the foregoing, we conclude that AMC has not justified its requests that we rescind the *Bureau Order* and designate the subject transfer applications for an evidentiary hearing to determine whether Sprint made prohibited *ex parte* presentations, misrepresented facts or "displayed a disqualifying lack of candor" in this case.[32]

V. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the Application for Review filed by American Message Centers on April 5, 1993, IS DENIED.

17. IT IS FURTHER ORDERED that the "Motion for Leave to Submit Further Response," filed by Sprint Corporation on May 12, 1993, IS GRANTED.

18. IT IS FURTHER ORDERED that the Application for Review filed by AMC on June 28, 1993, IS DISMISSED.

19. IT IS FURTHER ORDERED that the "Motion for Consolidated Hearing" filed by AMC on June 29, 1993, IS DENIED.

20. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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cance of the March 9 date prior to Sprint's status inquiry, as the date for the planned merger had been widely reported in the trade press. *See, e.g.*, Communications Daily (Feb. 8, 1993) at 6-7 (Sprint and Centel said merger will be completed March 9 unless unforeseen regulatory roadblocks develop); Telecommunications Reports (Feb. 22, 1993) at 49 (merger between Sprint Corp. and Central Corp. "expected to close March 9").

[31] AMC argues that the failure to report this, as well as the other *ex parte* rule violations, to the Managing Director required the Bureau to recuse itself from the decision-making process in this proceeding and in AMC's complaint proceeding against Sprint. We disagree. The Bureau was not aware at the time the written presentations were made that copies of these written communications had not been served on the other parties to the proceeding nor, as stated above, did it believe that the nature of Sprint's status inquiry violated the *ex parte* rules. In light of this and the fact that AMC already had informed the Managing Director of the *possible* occurrence of alleged *ex parte* violations, we do not believe that the Bureau's failure to report the violations indicates any bias. Nor do we believe that the fact that the Bureau received these impermissible *ex parte* presentations or that AMC has accused it of impropriety rendered the Bureau incapable of impartial decision-making in this or the complaint proceeding. Moreover, as noted above, AMC was not prejudiced by the *ex parte* contacts. Finally, we note that the Commission has independently reviewed this matter and we conclude that the transfer of control serves the public interest, convenience and necessity. Thus, we decline to hold that the Bureau's actions violated the procedural due process rights of AMC or, in a similar vein, that procedural due process required the Bureau to recuse itself from the decision-making process.

[32] Application for Review at 15.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for waiver of the requirements in Section 80.453 of the Rules to permit public coast station KQU546 to serve mobile vehicles on land.

ORDER

Adopted: August 12, 1993; Released: August 24, 1993

By the Chief, Special Services Division:

I. INTRODUCTION

1. Kelley Enterprises of Muskegon, Inc. (Kelley), licensee of very high frequency (VHF) public coast station KQU546, has requested a waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of its station license to permit it to serve a limited number of land mobile vehicles and handheld units on a secondary basis. This action grants the requested waiver.

II. BACKGROUND

2. In the *Report and Order* in PR Docket No. 86-2, 1 FCC Rcd 1312 (1986) (*Report and Order*), the Commission declined to adopt rules that would have permitted VHF public coast stations to serve vehicles on land on a subsidiary basis. The Commission found that conditions in the VHF public coast station market are not sufficiently homogeneous to permit such service nationwide. The Commission stated: "The comments point out that maritime frequencies in many areas of the country are already extremely congested. In other areas of the country, however, lakes and rivers freeze over and the seasonal factors greatly affect capacity." *Report and Order* at paragraph 7. Nevertheless, the Commission recognized that "there may be cases where individual stations or systems of stations may have excess capacity on an hourly, daily or seasonal basis and could design a subsidiary service to vehicles which would ensure against interference to, or derogation of, maritime communications." *Report and Order* at paragraph 8. The Commission indicated that it would consider such requests for waiver of the rules on an *ad hoc* basis. The Commission has since granted several such waivers.[1] The Commission based the waivers on the fact that each station had limited marine traffic that was variable in terms of peak usage. The Commission allowed land mobile service to be offered to a limited number of vehicles during off peak periods on a strictly secondary basis. The Commission has received no complaints about these operations.

III. DISCUSSION

3. Authorization of service to land vehicles must be carefully scrutinized to ensure that maritime public correspondence, which is part of a safety service, is not impaired. KQU546 is located in Michigan and is subject to seasonal climate conditions. Marine traffic for KQU546 generally serves recreational boats with heaviest use during the months of June to September, and during weekends and holidays of the rest of the year. In support of its request, Kelley indicates that it will provide services to a limited number of land vehicles and handheld units, particularly during periods when there is limited or no maritime traffic.

4. We are waiving the rules to permit Kelley to provide subsidiary service to an estimated twenty-five land vehicles and handheld units as requested. The waiver is contingent, however, on the conditions set forth below. Furthermore, such subsidiary service must cease within thirty days of the date of written notice if the Commission's staff determines that maritime communications are being impaired.

5. To minimize the potential for interference with other maritime safety or operational communications, the radio equipment installed in vehicles and the handheld units served by Kelley must be type accepted for use in the Maritime Services (Part 80), the Private Land Mobile Services (Part 90), or the Public Mobile Service (Part 22) and must be capable of operating only on the maritime public correspondence channel authorized for use by the public coast station. The mobile radios installed in vehicles and handheld units may be crystal controlled with only the appropriate crystals installed, or frequency synthesized equipment with switch or control panel "blocks" to prevent operation on other channels. The radios installed in vehicles and handheld units must not be capable of being tuned by control panel operation to any channel other than that authorized for station KQU546. Electrical or mechanical modifications of equipment beyond the scope of Class I permissive changes are not necessary to satisfy this condition. Therefore, no filing with the Commission should be required regarding such changes. *See* Section 2.1001 of the Rules, 47 C.F.R. § 2.1001. Our intent is to prevent equipment installed in vehicles or handheld units from operating on unauthorized frequencies by merely tuning such frequencies with external controls.

6. In the *Notice of Proposed Rule Making* in PR Docket No. 86-2, 51 Fed. Reg. 4525 (1986) at paragraph 8, the Commission indicated its intention to license subsidiary services on a "system" basis. It proposed that land vehicles use a public coast station's excess capacity to operate under the public coast station's license. Vehicle or handheld unit identification must consist of the public coast station's call sign and a numeric or alphabetical unit identifier. This increases the public coast station's incentive to control the vehicles' and handheld units' communications because enforcement efforts will focus on the public coast station

[1] *See, e.g., In the Matter of Global Communications, Inc.*, 7 FCC Rcd 2238 (1992), *In the Matter of Custard, Inc. Request for waiver of Section 80.453 of the Rules to permit public coast station KFN to serve mobile vehicles on land*, 7 FCC Rcd 4515 (1992), *In the Matter of Request for waiver of the requirements in Section 80.453 of the Rules to permit public coast station WHU638 to serve mobile vehicles on land*, 8 FCC Rcd 3061 (1993).

licensee rather than on individual vehicle or handheld unit operators. Also, authorizing subsidiary service on a system basis reduces paperwork requirements for both the public and the Commission by eliminating the need for separate licenses for each vehicle and handheld unit. Therefore, the license of Kelley will be modified accordingly. This method of licensing and identification will ensure that the licensee will take all necessary steps to prevent impairment of maritime services, consistent with the concerns expressed in PR Docket No. 86-2.

IV. CONCLUSION

7. In view of the above, IT IS ORDERED that the request for waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of public coast station license KQU546 submitted by Kelley Enterprises of Muskegon, Inc. to serve land mobile vehicles and handheld units on a secondary basis, IS GRANTED subject to the conditions set forth in paragraphs 5 and 6 above and subject to the condition that no impairment or interference is caused to maritime communications services.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Chief, Special Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petitions for Amendment of the	RM-8259
Amateur Service Rules To Establish	RM-8260
a No-Theory License, To Restore	
Previous Examination Standards, and	
To Redefine the Purposes of the	
Amateur Service.	

ORDER

Adopted: August 16, 1993; Released: August 24, 1993

By the Chief, Private Radio Bureau:

1. On April 19, 1993, Scott Leyshon (Leyshon) filed a petition (RM-8260) requesting that the amateur service rules be amended to eliminate all written examinations for an amateur operator license and that the Commission state whether the goal of the amateur service is technical or non-technical in nature. He argues that the present examinations place a premium on rules at the expense of technical content. No comments were received on the petition. A similar petition (RM-8259) was filed by Vincent Biancomano (Biancomano) on May 14, 1993. Biancomano, however, does not advocate elimination of the written examinations, but in all other respects concurs in Leyshon's petition. Both petitioners want the purposes of the amateur service redefined or, in the alternative, a restoration of prior examination standards.[1] Three comments were received in response to Biancomano's petition. The commenters believe that the Commission should state the goal of the amateur service as being either a technical or a non-technical service.

2. Insofar as the examinations for amateur operator licenses are concerned, the Commission is responsible for classifying station operators according to the duties they perform, and for issuing licenses to persons who are found qualified.[2] Section 97.503(b) of the Commission's Rules, 47 C.F.R. § 97.503(b), therefore, provides that a written examination must be such as to prove that the examinee possesses the operational and technical qualifications required to perform properly the duties of an amateur service licensee exercising the privileges of the class of license sought. The examination questions are prepared by knowledgeable amateur operators who volunteer their time and expertise. Of the 170 questions that appear on examinations for amateur operator licenses, only 46 concern current rules and operating procedures, while 124 concern contemporary technical matters. We do not believe, therefore, that the present examinations place an unjustified premium on rules. Nor do we agree that the examinations should be based upon dated technology.

3. The Commission's Rules for the amateur service, contained in Sections 97.1-97.527, 47 C.F.R. §§ 97.1-97.527, are designed to provide a service having a fundamental purpose as expressed in the five principles stated in Section 97.1. These principles clearly state that the advancement of amateur operator skills in both the operational and the technical phases of radio communications is encouraged. By and large, the amateur community does not want the explanation of the basis and purpose of the amateur service changed. This conclusion is based on the views that they have shared with us over the years generally in a rule making context. Further, the current statement of its purposes is serving the amateur service well. We do not agree, therefore, that there is any need for the goal of the amateur service to be stated as either technical or non-technical in nature.

4. In view of the foregoing, and pursuant to Section 1.401(e) of the Commission's Rules, 47 C.F.R. § 1.401(e), rule making petitions RM-8260 and RM-8259, filed by Scott Leyshon and Vincent Biancomano, respectively, to amend the amateur service rules do not warrant consideration by the full Commission and ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

[1] The rules adopted in the *Report and Order* in Docket No. 15928, are often referred to as "incentive licensing." The rules were implemented in two phases on September 22, 1967, and November 22, 1968. Leyshon wants the re-establishment of the examination standards that existed prior to the implementation of "incentive licensing" so that amateur operators can meet the purposes of the amateur service as stated in the amateur service rules and, therefore, be able to retain their presently allocated frequencies. Biancomano also wants a return to the examination standards that existed prior to incentive licensing.

[2] *See* Section 303(l)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(l)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Implementation of Further Cost Allocation Uniformity — AAD 92-42

ERRATUM

Released: August 24, 1993

By the Acting Chief, Common Carrier Bureau:

1. On July 1, 1993, the Common Carrier Bureau released an Order, which adopts uniform cost allocation procedures for certain accounts contained in the Commission's Uniform System of Accounts for Telecommunications Common Carriers (USOA).[1] Appendix B, page 4, of the Order contains an error. In Account 2121, Buildings, the apportionment basis for the network operations cost pool should exclude Account 6121. By this erratum, a revised Appendix B, page 4 is included as part of the Order.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

[1] Implementation of Further Cost Allocation Uniformity, 8 FCC Rcd 4664 (1993).

Account 2121, Buildings

Indirectly Attributed Comon Cost Pools(cont.)	Cost Pool Definition	Regulated/Nonregulated Apportionment Basis
Distribution Services	Cost associated with portions of buildings which house personnel who install, maintain, or support information origination/termination equipment or cable and wire facilities.	Indirect Attribution Current year salaries and wages in Accounts 2310–2441 and 6310–6441, excluding such salaries and wages associated with personnel who are assigned to buildings that are directly assigned to regulated or nonregulated activities.
Network Operations	Cost associated with portions of buildings which house personnel who support network operations.	Indirect Attribution Current year salaries and wages in Accounts 6110–6124 and 6510–6535, excluding Account 6121 and such wages associated with personnel who are assigned to buildings that are directly assigned to regulated or nonregulated activities.
Customer Operations	Cost associated with portions of buildings which house personnel who support customer operations.	Indirect Attribution Current year salaries and wages in Accounts 6610–6623, excluding such salaries and wages associated with personnel who are assigned to buildings that are directly assigned to regulated or nonregulated activities.
Corporate Operations	Cost associated with portions of buildings which house personnel who support corporate operations.	Indirect Attribution Current year salaries and wages in Accounts 6710–6728, excluding such salaries and wages associated with personnel who are assigned to buildings that are directly assigned to regulated or nonregulated activities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PETITION FOR A DECLARATORY RULING THAT GTE AIRFONE, GTE RAILFONE, AND GTE MOBILNET ARE NOT SUBJECT TO THE TELEPHONE OPERATOR CONSUMER SERVICES IMPROVEMENT ACT OF 1990

File No. MSD-92-14

DECLARATORY RULING

Adopted: August 18, 1993; Released: August 27, 1993

Comment Date: October 12, 1993
Reply Date: October 27, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Common Carrier Bureau has before it a Petition for Declaratory Ruling filed by GTE Service Corporation (GTE) on behalf of GTE Airfone Incorporated (Airfone), GTE Railfone Incorporated (Railfone), and GTE Mobilnet Incorporated (Mobilnet)[1] (collectively GTE subsidiaries), asking that none of the GTE subsidiaries be considered subject to the requirements of the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA).[2] On March 17, 1992, we issued a Public Notice requesting interested parties to file comments in response.[3] Seven comments and five reply comments were received.[4]

II. BACKGROUND

2. In October 1990, Congress enacted TOCSIA "to protect consumers who make interstate operator services calls from pay telephones, hotels, and other public locations against unreasonably high rates and anticompetitive practices."[5] Congress noted that in recent years a number of operator services companies have emerged. These operator services providers (OSPs) compete with local exchange and long distance carriers by providing telephones to the general public.[6] When a caller dials an operator assisted sequence from a telephone served by one of these OSPs the call is routed automatically to the OSP.[7] The OSP provides the desired operator services to facilitate completion of the call.

3. Congress was addressing two main concerns in enacting TOCSIA--ensuring that consumers are aware of the identity of the pre-subscribed operator service provider, and guaranteeing that callers are able to employ the carrier of their choice in placing operator-assisted calls. Congress directed the Commission to prescribe rules that assure that the objectives of TOCSIA are met.[8] In 1991, the Commission adopted the rules and regulations pertaining to operator service providers mandated by Congress.[9]

4. A telecommunications service is covered by the Commission's operator service rules if the service includes any automatic or live operator assistance to the caller to arrange for billing or completion of an interstate call through a method other than (1) automatic completion with billing to the telephone from which the call originated, or (2) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.[10] There are two

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[1] All references to Mobilnet herein refer only to GTE's subsidiary which provides cellular credit card activated telephones in rental cars. GTE is also a cellular licensee in a number of cellular markets and operates under the name GTE Mobilnet in these markets. Our ruling does not pertain to GTE's cellular licenses *per se*.

[2] 47 U.S.C. § 226 (1990).

[3] *See* Public Notice, Mimeo No. 22280, Mar. 17, 1992. We issued a subsequent Public Notice amending the comment filing dates. *See* Public Notice, Mimeo No. 22316, Mar. 19, 1992.

[4] *See* Appendix. To the extent commenting parties are seeking a ruling broader than that sought by GTE, their pleadings are also being treated as petitions for declaratory ruling and are addressed by this ruling.

[5] S. Rep. No. 439, 101st Cong., 2d Sess. at 1 (1990); *see also* H.R. Rep. No. 213, 101st Cong., 1st Sess. at 2. (1989)("the purpose of [the Act] is to protect telephone consumers against unfair process and practices of some operator service providers (OSPs), yet allow the legitimate companies in the industry the opportunity to compete in the market.") "Operator services" include collect or person-to-person calls, calls billed to a third number, and calls billed to a calling card or credit card. These services may be provided by an automated device as well as by a live operator. S. Rep. No. 439, 101st Cong., 2d Sess. at n.1.

[6] *See id.* at 2.

[7] All credit card calls are considered "operator assisted" whether the customer utilizes a live operator or not.

[8] On June 14, 1990, the Commission issued its initial Notice of Proposed Rulemaking. *See* Notice of Proposed Rulemaking, Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, 5 FCC Rcd 4630 (1990) (NPRM). On December 21, 1990, the Commission issued a Further Notice of Proposed Rulemaking in the same proceeding. *See* Further Notice of Proposed Rulemaking, 6 FCC Rcd 120 (1990) (FNPRM). We note that while GTE filed comments generally in support of the above proceeding on September 7, 1990, GTE did not mention any of its subsidiaries which are at issue in the current proceeding.

[9] *See* Policies and Rules Concerning Operator Service Providers, Report and Order, CC Docket No. 90-313, 6 FCC Rcd 2744 (1991) (*Report and Order*), *recon.*, 7 FCC Rcd 3882 (1992). *See also* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, Report and Order and Further Notice of Proposed Rule Making, 6 FCC Rcd 4736 (1991), Second Report and Order, 7 FCC Rcd 3251 (1992), *recon.*, 7 FCC Rcd 4355 (1992).

[10] *See* 47 C.F.R. § 64.708(g).

categories of rules adopted pursuant to TOCSIA--rules which are applicable to aggregators[11] and rules which are applicable to operator service providers (OSPs).[12]

5. Pursuant to the Commission's Rules adopted under TOCSIA, an aggregator is required to post certain information on or near the telephone.[13] The aggregator must also ensure that its telephones do not block the access codes to other than the presubscribed OSP so consumers have the ability to utilize other providers of operator services. Finally, the aggregator must ensure that no charge by the aggregator to the consumer for using an access code to another OSP is greater than for calls placed using the presubscribed OSP.[14] The Commission stated that any entity which exercises control over the telephone, whether through ownership of the equipment or control of access to the equipment, will be responsible as an aggregator under the Act and our Rules.[15] Accordingly, there will be instances where the premises owner and the equipment owner will share responsibility as aggregators.

6. An OSP, on the other hand, is required to double brand calls,[16] to permit the consumer to terminate the call at no charge before the call is connected and to disclose certain information to the customer at no charge.[17] The OSP must also ensure that the aggregator is in compliance with the aggregator provisions and withhold payment if the aggregator is blocking access codes. The OSP may not bill for unanswered calls, engage in call splashing,[18] or bill for a call that does not reflect the location of the origination of the call.[19] It is possible for an entity to be both an aggregator and an OSP and therefore subject to the requirements for both.

7. On November 13, 1992, the Commission submitted its Final Report to Congress regarding TOCSIA.[20] The Commission stated in this report that:

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[11] The term "aggregator" is defined in paragraph (b) of Section 64.708 of the Commission's Rules as follows: "[A]ny person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 C.F.R. § 64.708(b); *see also* 47 U.S.C. § 226(a)(2).

[12] For the purposes of these requirements, an OSP is a provider of:

> any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than--
>
> (A) automatic completion with billing to the telephone from which the call originated; or
>
> (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

47 C.F.R. §§ 64.708(g), 64.708(i); 47 U.S.C. §§ 226(a)(7), 226(a)(9). The Commission has noted that this definition of OSP may not be appropriate for purposes other than identifying which carriers are subject to the OSP requirements of TOCSIA. For instance, the Commission has stated that Congress may not have intended the access code exclusion to apply to the definition of an OSP for compensation purposes. *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Second Report and Order, *supra*, at 3261.

[13] The information the aggregator must post is as follows:

> (i) the name, address, and toll-free telephone number of the [presubscribed] provider of operator services;
>
> (ii) a written disclosure that the rates for all operator-assisted calls are available upon request, and that consumers have a right to obtain access to the interstate common carrier of their choice and may contact their preferred interstate common carriers for information on accessing that carrier's service using that telephone; and
>
> (iii) the name and address of the Enforcement Division of the Common Carrier Bureau of the Commission, to which the consumer may direct complaints regarding operator services.

47 C.F.R. § 64.703(b); 47 U.S.C. § 226 (c)(1)(A).

[14] *See* 47 C.F.R. §§ 64.703(b), 64.704(a), (c) and 64.705(b); *see also*, 47 U.S.C. §§ 226(c)(1)(A), (B), and (C).

[15] *See Report and Order*, 6 FCC Rcd at 2751.

[16] Call branding "is the process by which an OSP audibly and distinctly identifies itself to every person who uses its operator services." *NPRM*, 5 FCC Rcd at 4632. The OSP is required to brand the call at the beginning of each call and again before the customer incurs any charge for the call. *See* 47 C.F.R. §§ 64.703(a), 64.703(c); 47 U.S.C. § 226(b)(1)(A).

[17] The information which the OSP must furnish to the customer upon request is:

> (i) a quote of its rates or charges for the call;
>
> (ii) the methods by which such rates or charges will be collected; and
>
> (iii) the methods by which complaints concerning such rates, charges, or collection practices will be resolved.

47 U.S.C. § 226(b)(1)(C).

[18] "Call splashing" refers to the transfer of a telephone call from one provider of operator services to another where the second provider is unable to determine the location of the originating call and is prevented from billing the call on the basis of such location. *See* 47 C.F.R. § 64.708(c); 47 U.S.C. § 226(a)(3). Example:

> A consumer in a hotel in Washington, D.C., wishes to place a call using a calling card from his chosen IXC to Baltimore, Maryland. The presubscribed OSP for that hotel is based in Chicago. The OSP is unable to accept the calling card, so the caller asks the OSP to transfer the call to an operator of his or her chosen IXC. The operator of the consumer's carrier of choice is unaware that the call is originating in Washington and believes that the call is originating in Chicago. The customer is, therefore, billed for a call from Chicago to Baltimore, rather than from Washington to Baltimore.

Call splashing is allowed when the consumer requests to be transferred to another OSP, the consumer is notified in advance that the rates for the call may not reflect the rates from the actual originating location of the call, and the consumer thereafter consents to be transferred. *See* 47 C.F.R. § 64.705(a)(3); 47 U.S.C. § 226(b)(1)(H).

[19] *See* 47 C.F.R. §§ 64.703(a)(1)-(3), 64.704(b), and 64.705(a)(1)-(5); *see also* 47 U.S.C. §§ 226(b)(1)(A)-(I).

[20] Pursuant to the requirements of TOCSIA, the Commission was to file three reports with Congress. On May 14, 1991, the Commission submitted its First Report; on Novembere 14, 1991, the Commission submitted its Second Report.

(1) The statutory objectives of TOCSIA are being achieved. Consumers are being protected from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. Further, consumers have an opportunity to make informed choices in making such calls.

(2) Market forces are securing just and reasonable rates.

Final Report at 1. The Commission detailed the factual findings in its report which led to the conclusions stated above. Additionally, the Commission stated that it believes it has a continuing duty to ensure that all of the problems that prompted Congress to adopt TOCSIA have been solved.

III. GTE's PETITION

8. GTE asks for a declaratory ruling that the types of communications services provided by the GTE subsidiaries are not subject to the requirements of TOCSIA. GTE expresses concern that application of TOCSIA to Airfone, Railfone, and Mobilnet may adversely affect the continued development of air-to-ground (ATG) and cellular credit card services, to the detriment of the public.

9. The GTE subsidiaries offer three different types of mobile telecommunications services. Airfone is a Commission licensee which provides telephone service to passengers of commercial and private aircraft.[21] Airfone owns and operates the radio and passenger handset equipment installed on airplanes. Airfone also owns and operates nearly 100 base stations that are used to establish a communications link between aircraft equipment and the ground. From the ground station, calls are routed through Airfone's private network or through the public switched network. Customers are charged an initial activation fee and a time sensitive usage fee. Customers are not charged separately for the land-based portion of long-distance calls.

10. Railfone provides telephone service to passengers of certain rail lines. Railfone is a cellular and long distance reseller, not a Commission licensee, and provides credit card cellular pay telephone service on trains. The charge for the call is, like that of Airfone, time-sensitive and billed on a per-minute basis only. Long distance service is not charged separately to the customer. Mobilnet is also a provider of credit card cellular telephone service providing service through cellular resale. Through agreements with rental car providers, Mobilnet installs its credit card activated cellular telephones in rental cars. If the caller makes a long distance call using an interexchange carrier (IXC) of his or her own choosing, the charges for the long distance portion are billed separately and directly by the IXC. Both Railfone and Mobilnet are resellers of cellular service and the underlying facilities based cellular carrier is not necessarily controlled by GTE. Railfone and Mobilnet, therefore, do not provide direct interconnection to the public switched network. The interconnection is provided by the underlying facilities based cellular licensee.

11. In its petition, GTE argues that the definitions in TOCSIA refer to fixed, rather than mobile, locations. Specifically, GTE argues that an aggregator is defined as one who makes phones available to transient users of its premises and an OSP is defined as one who provides operator services from an aggregator location. According to GTE, "premises" and "location" refer to a fixed point. Airplanes, railroad trains and rental cars, argues GTE, do not constitute fixed points and are not, therefore, premises or locations under TOCSIA. GTE additionally argues that certain of the requirements of TOCSIA are impossible for its subsidiaries to comply with for technical reasons. GTE asserts that the legislative history of TOCSIA demonstrates that the problems TOCSIA was designed to prevent do not exist with the services offered by the GTE subsidiaries.

IV. COMMENTS AND REPLY COMMENTS

12. Several commenters support GTE's position, but suggest the Commission go further than just declaring TOCSIA inapplicable to the GTE subsidiaries. For example, In-Flight Phone Corporation (In-Flight), another ATG service provider and Commission licensee, urges the Commission to extend its ruling on GTE's petition to exempt all 800 MHz Air-Ground Telephone Service licensees from the rules adopted pursuant to TOCSIA. McCaw Cellular Communications, Inc. (McCaw) and PhoneTel Technologies, Inc. (PhoneTel) argue that all mobile services should be exempt. Cellular, Inc. (CI), for its part, suggests that the Commission declare that no cellular pay telephones are subject to Commission regulation under TOCSIA.

13. Other commenters argue, in addition to supporting GTE's petition, that the particular services which they provide should also be exempt. For example, Waterway Communications System, Inc. (Waterway), Commission licensee of an Automated Maritime Telecommunications System (AMTS) located along the Mississippi, Illinois, and Ohio Rivers and Gulf Intracoastal Waterway, contends that the shipboard telephone service on river cruise boats and harbor cruise or dinner cruise boats it provides should be exempt from the requirements of TOCSIA. Similarly, Petroleum Communications, Inc. (Petrocom), Commission licensee of the Domestic Public Cellular Radio Telecommunications Service system on frequency Block A in the Gulf of Mexico Service Area, maintains that the cellular pay telephone service it provides for the oil industry employees who work on various drilling rigs, production platforms, and marine vessels in the Gulf should be exempt.

14. American Telephone and Telegraph Company (AT&T) and MCI Telecommunications Corporation (MCI) opposed GTE's petition. AT&T argues that the GTE subsidiaries' service arrangements fall within the scope of TOCSIA. MCI agrees, stating that "it seems clear that the GTE companies are providing operator services at aggregator locations and, therefore, are subject to the requirements of TOCSIA."[22]

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[21] There are five other entities licensed by the Commission to provide 800 MHz Air-Ground telephone service.

[22] MCI Comments at 3. MCI suggests that the Commission waive any provision of the Commission's Rules with which GTE's subsidiaries cannot comply for technical reasons, instead of granting a wholesale exemption from TOCSIA. We, note, however, that the provisions for the rules under TOCSIA are statutory and the Commission has limited discretion to waive any of the provisions.

V. DISCUSSION

A. GTE Subsidiaries

15. As stated previously, there exist two categories of rules adopted under TOCSIA--rules that apply to aggregators and rules that apply to OSPs. Our discussion, therefore, begins with an analysis of whether the GTE subsidiaries can be considered aggregators under our rules and then turns to whether the GTE subsidiaries can be considered OSPs.

16. We have reviewed GTE's petition and the comments and reply comments and we determine that Airfone, Railfone, and Mobilnet are aggregators within the meaning of TOCSIA. The statutory definition of aggregator is clear and unambiguous. The GTE subsidiaries all, "in the ordinary course of [their] operations, make[] telephones available to the public or to transient users of [their] premises, for interstate telephone calls."[23] We find no support in the statutory language or legislative history of TOCSIA for the limited definition of "premises" and "location" proffered by GTE. GTE argues that the definition of premises refers to a fixed point and not a mobile site such as an airplane, train, or rental car. We do not believe that such a narrow definition of "premises" serves the purpose of the rule or the underlying statute. GTE also argues that Congress only intended TOCSIA to apply to telephones made available in "hotels, universities, and other public locations."[24] GTE asserts that airplanes, trains, and rental cars are not "locations" because such vehicles are mobile. We conclude, however, that airplanes, trains, and rental cars can reasonably be considered "locations" despite the fact that they are mobile. The Commission specifically stated in the *Report and Order* establishing our TOCSIA rules that it "will interpret the definition [of aggregator] broadly enough to ensure compliance with the goals of our rules and the Act."[25]

17. Moreover, the statute applies not only to telephones made available to transient users of the aggregator's premises, but also to telephones made available to the public. The telephones offered by the GTE subsidiaries are available to the public.[26] This is not a situation in which the telephones are made available by "establishments such as law firms or corporations . . . solely for the convenience of their customers," which Congress stated would be exempt from the rules under TOCSIA.[27] The telephone service provided for the convenience of customers referred to by Congress are courtesy telephones. The telephones provided by the GTE subsidiaries are not courtesy telephones because the consumer, not the telephone provider, pays for the cost of the call. Because the telephones provided by the GTE subsidiaries fall within the statutory definition of aggregator telephones, the GTE subsidiaries must comply with the aggregator rules. Therefore, GTE's petition must be denied in so far as the aggregator rules of TOCSIA are concerned.[28]

18. Having ruled that Airfone, Railfone, and Mobilnet are aggregators under our rules, we now turn to whether the GTE subsidiaries are OSPs under the rules. An OSP, as discussed above, is a provider of interstate telecommunications service initiated from an aggregator location that includes automatic or live assistance for billing or call completion.[29] Airfone does provide this type of service. Airfone not only provides a radio link between the airplane and ground base station, but also interconnects directly to the interstate switched network. Because Airfone's telephones are activated by credit cards, Airfone provides automatic assistance for billing purposes.[30] Accordingly, we find Airfone to be an OSP under our rules that must comply with the OSP rules of TOCSIA.

19. The concerns expressed by GTE about its inability to comply with various TOSCIA rules are misplaced. For instance, GTE maintains that Airfone cannot comply with the call splashing prohibition of Section 64.705(a)(3) of the Rules. GTE argues that because it is impossible to determine the precise location where the call was placed it cannot comply with Section 64.705. Currently, if a customer using Airfone chose to use his or her own IXC, the location on the bill would reflect the location of the intercepting ground station and not the actual location of the airplane at the time the call was placed.[31] Airfone is currently converting to a second-generation system that will route all calls from the receiving ground station to one of two switching centers and the location of the call would, therefore, reflect one of these two switching centers in the future.

20. However, Section 64.705(a)(3) allows splashing when the customer requests to be transferred to another provider of operator services, the customer is informed that the rates for the call may not reflect the actual originating location of the call, and the customer consents to the transfer. Accordingly, Airfone informs customers in the posting of its rates that they can select the IXC to carry their call, but that the rates charged by that IXC may reflect an originating location other than the plane's actual location, then a customer could choose to use his or her own IXC by consenting to the transfer and the splashing would be allowed.[32]

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[23] *See* 47 C.F.R. § 64.708(b); 47 U.S.C. § 226(a)(2).

[24] S. Rep. No. 439, 101st Cong., 2d Sess. at 2, 5.

[25] *Report and Order*, 6 FCC Rcd at 2751.

[26] While it is true that the telephones offered by Airfone and Railfone are only available to ticketed passengers and the telephones offered by Mobilnet are only available to automobile rental agreement holders, we believe that the telephones are nonetheless available to the public. This situation is analogous to the payphones available inside airport terminals which are only available to ticketed passengers who have cleared security. Although these payphones are only available to ticketed passengers as well, the mandates of TOCSIA apply.

[27] *See* S. Rep. No. 439, 101st Cong., 2d Sess. at 10.

[28] We note also that the airlines, railroad carriers, and car rental agencies which have GTE telephones installed in their vehicles are aggregators under our rules because they are providing the use of the telephones to transient users and members of the public, their customers.

[29] *See* 47 C.F.R. § 64.708(g); 47 U.S.C. § 226(a)(7).

[30] Additionally, Airfone provides its own live operators to assist customers.

[31] There is no practical method to determine from the airplane in every case which base station will pick up a call when it is placed.

[32] We note that Airfone now bundles the airtime and long distance portion of its rates. This bundling would apparently allow Airfone to charge the same rate to the customer regardless of whether the customer chooses his or her own IXC. Under this scenario, if a customer were to choose his or her own IXC, he or she would be billed Airfone's bundled rate and also billed by the chosen IXC, thereby incurring a higher overall charge.

21. Both Railfone and Mobilnet only provide radio links to a facilities based cellular carrier. The underlying cellular carrier that provides the operator service interconnects directly to the interstate public switched network. Therefore, we find that Railfone and Mobilnet are not OSPs under our rules. Rather, the cellular carriers that connect the calls from Railfone and Mobilnet to the switched network are the OSPs for the services provided. For this reason, GTE's concern that it cannot brand calls on Railfone and Mobilnet because it does not control the cellular switch which receives the calls is misplaced. The call branding requirement is a regulation imposed upon the OSPs. Because Railfone and Mobilnet are only aggregators under our rules, Railfone and Mobilnet do not need to comply with the OSP requirements.[33]

22. Likewise, because our ruling that the telephones provided by Airfone fall within the aggregator provision of our rules, In-Flight's petition to exempt all ATG licensees from TOCSIA must be denied in so far as the aggregator rules are concerned. Accordingly, we extend our ruling that Airfone must comply with the aggregator rules to all ATG licensees. Likewise, our ruling that Airfone is an OSP under the Rules extends to all ATG carriers. Therefore, all the ATG licensees are to comply with the OSP requirements as well as the aggregator requirements of TOCSIA. Accordingly, In-Flight's request that all ATG licensees be exempt from the requirements of TOCSIA is denied.

B. Waterway

23. We also find that Waterway's AMTS services is not exempt from either the aggregator or OSP requirements of TOCSIA. Waterway provides telephones on river cruise boats and harbor cruise or dinner boats. These telephones are available for interstate telephone calls by the public and by transient users of the premises of the boat. Waterway is therefore an aggregator under our rules. Waterway argues that the call blocking prohibition has no application to it because the radio link provided by Waterway from the ship to the shore base station is the only manner in which a customer could obtain a radio link needed for a call. Therefore, argues Waterway, the customer can not avoid using Waterway's services in order to place a call. Waterway, however, has misconstrued the call blocking prohibition. While it is true that a customer must use Waterway to establish a radio link with the shore, the customer does not have to accept the presubscribed IXC that connects the call from the shore base station to its terminating point. Therefore, after the link with the shore has been established, Waterway may not block access to the IXC of the customer's choosing.[34] Consumers must be allowed to use the long distance carrier of their choice. Accordingly, Waterway's request that its AMTS services offered to customers on river and harbor cruise boats be exempt from the aggregator requirements of TOCSIA is denied.[35]

24. Waterway, like Airfone, offers more than a radio link to a receiving station. Waterway is the provider of an operator service offering interconnection to the switched network. Waterway furnishes both live operator assistance and automatic connection. Waterway, therefore offers interstate telecommunications service from an aggregator location using an automatic or live operator for billing and call completion. Accordingly, Waterway is an OSP under our rules,[36] and is therefore required to comply also with the OSP rules of TOCSIA.[37]

C. Petrocom

25. Petrocom, as the licensee of cellular frequency Block A in the Gulf of Mexico, provides pay telephone service to oil industry employees, who typically work two-week shifts, on drilling rigs, production platforms, and marine vessels. Petrocom states that none of its telephones is in a public location. Rather, its cellular telephones are in areas accessible only with the permission of the oil company owners. We find, however, that Petrocom is an aggregator under TOCSIA. While the oil platforms may not be public, and despite the length of their shifts, which requires the oil industry employees to take temporary residence off shore, the users of Petrocom's telephones are "transient users of [the oil company's] premises."[38] Petrocom, therefore, fits within the definition of an aggregator.[39] The work shifts of the oil industry employees are of a duration that makes the

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This practice contravenes the underlying goal of TOCSIA which allows callers to choose the IXC offering the best rate and to pay that rate. While we have serious concerns about the lawfulness of this practice, this issue is not within the purview of this Order.

[33] The facilities based cellular carrier which intercepts Railfone's or Mobilnet's calls, however, is an OSP under the Commission's rules. Therefore, the cellular licensee will be required to comply with the OSP rules adopted pursuant to TOCSIA.

[34] Like Airfone, Waterway has bundled its airtime and long distance charges. A customer using Waterway will apparently incur a higher total charge for a call if he or she chooses his or her own carrier. As we said with respect to Airfone, we have serious concerns about the reasonableness of this practice. *See* note 32, *supra*. However, the legality of Waterway's tariff is not within the scope of this proceeding. We only decide here that Waterway is subject to the requirements of TOCSIA.

[35] Moreover, the river boat and harbor and dinner cruise boat companies which have allowed the installation of Waterway telephones on their vessels are also agreggators under our rules.

[36] Waterway does not dispute the fact that it is an OSP in its comments. Instead, Waterway simply requests that any exemption given to the GTE subsidiaries also be extended to AMTS service.

[37] To avoid violating the call splashing requirements of our rules (Section 64.705(a)(3)), Waterway must, in the posting of its rates, inform customers that if they choose their own IXC, the billing location reflected on the resulting long distance bill will be the location of the receiving switch and not the location of the ship. If the customer elects to be transferred to an IXC other than the presubscribed IXC after being informed of this the customer will have consented to the transfer. Therefore, even though the location of the call on a long distance portion of the bill would reflect the receiving shore station and not the actual origination of the call, the splashing is allowed because the customer consented. *See* 47 C.F.R. § 64.705(a)(3).

[38] *See* 47 C.F.R. § 64.708(b); 47 U.S.C. § 226(a)(2).

[39] Petrocom likens its situation to that of a telephone made available by "establishments such as law firms or corporations...solely for the convenience of their customers," which is exempt from TOCSIA. *See* S. Rep. No. 439, 101st Cong., 2d Sess. at 10. As stated previously, this type of telephone is a courtesy telephone. The telephones offered by Petrocom are not courtesy telephones because the cost of the call is borne by the customer and not the telephone provider. *See* ¶ 17, *supra*.

employees "transient."[40] We believe that the dual concerns of Congress that consumers are aware of the pre-subscribed operator service provider and that the consumer have the opportunity to employ the carrier of his or her choice are present here. Petrocom has failed to demonstrate any basis for it not being considered an aggregator under our rules. Accordingly, we are denying Petrocom's request and Petrocom must, therefore, comply with the aggregator requirements of our rules.[41]

26. Further, the service offered by Petrocom is an interstate telephone service that originates from an aggregator location, and includes automatic or live assistance for billing and call completion purposes. Petrocom offers cellular radio telephone service from the Gulf of Mexico to the shore and connection with the public switched network. Petrocom is, therefore, an OSP under our rules. Accordingly, we deny Petrocom's request for an exemption from the rules established pursuant to TOCSIA and rule that Petrocom must also comply with the OSP requirements of our rules.

27. Petrocom argues that applying the aggregator rules to its cellular service in the Gulf could force it to discontinue service. Petrocom states that if it failed to block access codes, its customers would avoid airtime charges by placing calls with their selected IXCs. Petrocom asserts that the large IXCs will not bill and collect cellular airtime charges in connection with their provision of OSP services. Petrocom argues that without compensation for the cellular airtime on its cellular pay telephones it will not be able to afford to continue service in the Gulf of Mexico.

28. The issue of compensation for competitive private pay telephone owners has been addressed by the Commission, and Petrocom participated in these proceedings. In the Commission's *Second Report and Order* in CC Docket 91-35,[42] the Commission stated that the question of whether companies such as Petrocom are aggregators and thus would be required to unblock access to the IXCs of the customer's choice was at that time unresolved.[43] The Commission, therefore, did not rule on the issue of compensation to Petrocom. However, based on the record here, it appears that once Petrocom unblocks access from its phones, it will not be able to collect airtime charges.[44] Thus, we tentatively conclude that Petrocom is entitled to compensation, but we lack sufficient information to determine the exact level of compensation. Therefore, we order Petrocom to provide additional information on the level of compensation to which it believes it is entitled within 20 days of the release of this Order.[45] We further invite any interested party wishing to comment on either our tentative conclusion that Petrocom is entitled to compensation or on the amount Petrocom should be compensated to file comments within 45 days of the release of this Order. Reply comments will be due 60 days after the release of this Order.

D. Other Commenters

29. We also deny the broad ruling sought by McCaw and PhoneTel to exempt all mobile telephones from our TOCSIA rules. McCaw and PhoneTel advance the same argument as GTE that "premises" does not apply to mobile telephones, an argument we have already rejected. Accordingly, we rule that the provider of any mobile telephone made available for interstate telephone calls either to the public, or to transient users of the mobile premises, must comply with the aggregator rules of TOCSIA. For the same reasons, we deny CI's request to exempt all cellular pay telephones from the requirements of TOCSIA. Any entity providing cellular telephones for interstate calls to the public or to transient users of the premises in which the cellular telephones are installed must comply with the Commission's aggregator rules.

30. The comments filed by McCaw, PhoneTel, and CI do not describe any specific service to the degree necessary to make a determination whether other mobile or cellular telephone service providers are OSPs under the Rules. The comments filed by these parties speak only in general terms about exempting all mobile and cellular telephones from the requirements of TOCSIA. If, however, the service provider, such as McCaw, PhoneTel, or CI, provides interstate telecommunications service from an aggregator location that includes automatic or live assistance for billing or call completion without billing to the telephone from which the call was placed or without an access code or previously established billing account, then the service provider must comply with the OSP requirements for that service.

IV. CONCLUSION AND ORDERING CLAUSES

31. In conclusion, we find that TOCSIA is clear in its terms. The statute mandates that the Commission regulate as an aggregator any entity that makes telephones available to the public or to transient users of its premises and that we regulate as an OSP any entity that provides interstate telecommunications service initiated from an aggregator location that includes automatic or live assistance to arrange for billing or call completion. We find that the GTE subsidiaries, as well as all ATG carriers, Waterway, and Petrocom provide services which make them aggregators. Furthermore, we find that Airfone, as well as all ATG carriers, Waterway, and Petrocom provide services which make them OSPs. The statute requires that the petitioners

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[40] *See e.g., Report and Order*, 6 FCC Rcd at 2752, n.31. (University housing which is other than a typical apartment building is covered under the definition of TOCSIA).

[41] The oil companies with Petrocom telephones installed on their drilling rigs, production platforms, and marine vessels are also aggregators under the Commission's rules.

[42] Policies and Rules Concerning Operator Access and Pay Telephone Compensation, Second Report and Order, 7 FCC Rcd 3251 (1992)

[43] The Commission referenced the instant petition for declaratory ruling filed by GTE. *See* Second Report and Order, 7 FCC Rcd at n.103.

[44] Apparently the issue of compensation does not arise for the GTE subsidiaries or for Waterway because these entities use credit card activated telephones that enable GTE and Waterway to obtain billing information independent of the IXC used by the customer. Therefore, GTE and Waterway are able to bill the customer for the airtime and the IXC bills separately for the long distance portion of the call.

[45] Any other mobile telecommunications carrier affected by this Order that believes it may be entitled to compensation as result of being covered by the requirements of TOCSIA also should file comments within 45 days of the release of this Order. Based on the record in this proceeding, however, we do not conclude that any other mobile telecommunications carrier is entitled to compensation.

and commenters must comply with the requirements of TOCSIA.[46] Accordingly, we deny the petition for declaratory ruling and other requests for exemptions of TOCSIA.

32. IT IS THEREFORE ORDERED that the Petition for a Declaratory Ruling filed by GTE Service Corporation that GTE Airfone Incorporated, GTE Railfone Incorporated, and GTE Mobilnet Incorporated to be exempt from the requirements of the Telephone Operator Consumer Services Improvement Act of 1990 IS HEREBY DENIED.

33. IT IS FURTHER ORDERED that the requests of Waterway Communications System, Inc. and Petroleum Communications, Inc. for an exemption from the requirements of the Telephone Operator Consumer Services Improvement Act of 1990 ARE HEREBY DENIED.

34. IT IS FURTHER ORDERED that the declaratory rulings filed by In-Flight Phone Corporation, McCaw Cellular Communications, Inc., PhoneTel Technologies, Inc., and Cellular, Inc., for broad exemptions from the requirements of the Telephone Operators Consumer Services Improvement Act of 1990 ARE HEREBY DENIED.

35. IT IS FURTHER ORDERED that Petroleum Communications, Inc. SHALL FILE additional information within 20 days of the release of this Order demonstrating the level of compensation to which it believes it is entitled.

36. IT IS FURTHER ORDERED that parties wishing to comment on either the tentative conclusion that Petrocom is entitled to compensation, or on Petrocom's comments concerning the amount that Petrocom should be compensated shall file comments by **October 12, 1993**. Reply comments shall be filed by **October 27, 1993.**

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

APPENDIX A

PARTIES FILING COMMENTS

American Telegraph and Telephone
Bell Atlantic Telephone Companies[47]
Cellular, Inc.
Inflight Phone Corporation
MCI Telecommunications Corporation
Petroleum Communications, Inc.
Waterway Communications System, Inc.

PARTIES FILING REPLY COMMENTS

MCI Telecommunications Corporation
GTE Service Corporation
McCaw Cellular Communications, Inc.
PhoneTel Technologies, Inc.
Waterway Communications System, Inc.

[46] Those only providing telephones without providing interstate operator service are only subject to the aggregator requirements.
[47] The Bell Telephone Company of Pennsylvania, the four Chesapeake and Potomac Telephone Companies, the Diamond State Telephone Company, and New Jersey Bell Telephone Company.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Allnet Communication Services, Inc.
Complainant,

v. File No. E-89-168

Michigan Bell Telephone Company,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: August 17, 1993; Released: August 25, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Allnet Communication Services, Inc. (Allnet) filed a complaint against Michigan Bell Telephone Company (Michigan Bell) alleging violations of Sections 201(b) and 202(a) of the Communications Act of 1934, as amended (Act), 47 U.S.C. §§ 201(b), 202(a). Specifically, Allnet alleged that Michigan Bell improperly derived the Transitional Support (TRS) and Long Term Support (LTS) payment obligation components of its carrier common line (CCL) rate by using an amount calculated on an aggregate regional basis by the National Exchange Carrier Association (NECA), rather than an amount calculated on an individual company basis. Michigan Bell denied the allegation and asserted that Allnet was collaterally estopped from filing the complaint because it had raised and litigated the same issue in a prior tariff proceeding. For the reasons given below, we deny the complaint.

II. BACKGROUND

2. The Commission's rules require certain telephone companies that no longer participate in the NECA CCL pool to make TRS contributions to NECA and LTS contributions to other telephone companies. *See* 47 C.F.R. § 69.612.[1] These payments are calculated, collected, and disbursed by NECA. Prior to April 1, 1989, all of the Ameritech Operating Companies[2] participated in the NECA CCL pool, and concurred in the NECA pool rates, as required by Commission rules at that time. Under the Commission's access charge regulatory scheme, telephone companies that were members of a group of affiliated companies were required to remain in the NECA pool, as a group, or withdraw simultaneously, as a group. Upon withdrawal, the telephone operating companies become obligated to pay the TRS and LTS obligations in an amount computed by NECA in accordance with Sections 69.612(a)(2) and (b)(2) of the rules, 47 C.F.R. §§ 69.612(a)(2), (b)(2). The NECA-calculated amounts attributable to TRS and LTS obligations are recovered in the contributor's CCL rates.

3. In 1989, the Ameritech Operating Companies withdrew from the NECA CCL pool. After the withdrawal, NECA calculated the TRS and LTS obligations for the Ameritech Operating Companies on an Ameritech regional aggregate basis, rather than an individual operating company basis. Ameritech then allocated the aggregate TRS and LTS obligation to its individual operating companies according to an internal formula. Allnet challenged Ameritech's use of aggregated TRS and LTS obligations in a petition to reject Ameritech's 1989 access tariff filings. Allnet contended that Ameritech had improperly allocated transitional and long term support payments among its operating companies in developing carrier common line charges by distributing support payments among its operating companies on the basis of total access lines. According to Allnet, such payments could be allocated more accurately for each individual company based upon disaggregated NECA data or, in the alternative, operating company common line demand projections. Allnet argued that under Ameritech's methodology, the proposed CCL rates for Michigan Bell substantially exceeded the proposed CCL rates for Ameritech's other operating companies, and were higher than those of any other local exchange carrier.[3]

4. In the *1989 Access Tariff Order*, the Common Carrier Bureau (Bureau) reviewed the situation as it existed prior to the withdrawal of the Ameritech Operating Companies from the NECA common line pool and denied Allnet's petition to reject. The Bureau concluded that the

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[1] Section 69.2 defines the TRS and LTS obligations as follow:

> (y) Long Term Support (LTS) means funds provided by telephone companies that are not association Common Line tariff participants to association Common Line tariff participants. LTS enables association Common Line tariff participants to charge a Common Line (CL) rate equivalent to the CL rate that would result if all telephone companies participated in the association Common Line tariff.
>
> * * * *
>
> (ii) Transitional Support (TRS) means funds provided by telephone companies that are not association Common Line tariff participants, but were net contributors to the association Common Line pool in 1988, to telephone companies that are not association Common Line tariff participants and were net receivers from the association pool in 1988.

[2] The Ameritech Operating Companies are Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

[3] Annual 1989 Access Tariff Filings, 4 FCC Rcd 3638, 3680 (Com. Car. Bur. 1989) (hereinafter "*1989 Access Tariff Order*") (citing Allnet Petition at 12-15).

> Commission's Rules require Ameritech, as a Level 1 Contributor, to make support payments "based upon the amount of [its] 1988 contributions to the association Common Line pool in relation to the total amount of 1988 Common Line pool contributions of all other Level 1 and Level 2 Contributors." 47 C.F.R. § 69.612(a)(1). The rules are silent regarding how the burden of this payment should be allocated at the operating company level. Accordingly, Ameritech's intracompany allocation is lawful if it produces the payments required by Section 69.612 and if the allocation method is reasonable. . . . While Ameritech's method may not produce the best outcome for ALC or be the most consistent with the method used to allocate payments among the RBOCs, we cannot say that it violates the Commission's Rules or is unreasonable. For these reasons, we deny ALC's request for a reallocation of Ameritech's support payments among its operating companies.

The premium terminating CCL rates that took effect on April 1, 1989 were 1.24 cents per minute in Illinois, 1.44 cents in Wisconsin, 1.54 cents in Ohio, 1.83 cents in Indiana, and 2.22 cents in Michigan.[4]

III. CONTENTIONS OF THE PARTIES

5. In its complaint, Allnet contends that Michigan Bell's terminating CCL rate is unjust, unreasonable, and discriminatory in violation of Sections 201(b) and 202(a) of the Act, because its TRS and LTS payment obligations have been misallocated by Ameritech. According to Allnet, the withdrawal of the Ameritech companies from the CCL pool required the individual Ameritech companies to pay the TRS and LTS obligation based on individual company costs, and not on an aggregate allocated basis, as Ameritech has done. Therefore, Allnet argues, Michigan Bell's CCL rates should have included only these TRS and LTS costs directly assigned to it by NECA.[5] Allnet also contends that the terminating CCL rate of Michigan Bell is unreasonably discriminatory because Ameritech's allocation of the regionally aggregated TRS and LTS obligation to its operating companies results in CCL rates that are higher in Michigan Bell's territory than in other Ameritech operating company territories. Allnet contends, in effect, that under Ameritech's methodology, CCL ratepayers in Michigan are subsidizing CCL ratepayers in Illinois and other high cost states in Ameritech's operating territory.

6. In subsequent phases of the instant complaint proceeding, Allnet expanded its argument to question the actual method Ameritech used to allocate TRS and LTS obligations to its individual operating companies.[6] Allnet argues that even if regional aggregation were permitted, Ameritech's allocation method, which uses access lines per company to distribute costs, constitutes an unreasonably discriminatory ratemaking practice in violation of Section 202(a) of the Act. Allnet maintains that to the extent regional TRS and LTS aggregation is allowed, the CCL rates should reflect an average for all operating companies rather than the individual CCL rates filed by Ameritech.[7]

7. In response, Michigan Bell contends that Allnet's restrictive definition of the term "telephone company" in the context of Part 69 of the rules is contrary to the Bureau's prior determination and, if adopted, would effect a fundamental change in nationwide TRS and LTS procedures and obligations.[8] According to Michigan Bell, Allnet's definition is contrary to the Commission's affiliate withdrawal rule, which provides that "a regional holding company and all its affiliates" must elect to withdraw from the CCL pool together.[9] Michigan maintains that this "all or none" requirement for withdrawal is also the basis of a region's status as a contributor or receiver under the TRS and LTS procedures.[10] Once the Ameritech Operating Companies withdrew as a group, Michigan Bell contends, the subsequent allocation of the TRS and LTS obligations among its constituent companies was done in a "reasonable manner."[11] Michigan Bell further argues that any interpretation of the terms used in Section 69.612 must be consistent with the basic workings of the Commission's procedure for recovering non-traffic sensitive costs. Michigan Bell states that Allnet's attempt to restrictively read the term "telephone company," as used in Section 69.612, to exclude regional holding companies is clearly inconsistent with the Commission's rules and TRS and LTS procedures.[12]

8. With respect to Allnet's claims regarding the per access line allocation method used by Ameritech to distribute TRS and LTS costs, defendant states that the Bureau has already ruled in its 1989 tariff order, *supra*, that the method chosen is reasonable. It further states that Allnet has presented no new evidence or arguments that would warrant a contrary ruling in this complaint proceeding.

IV. DISCUSSION

9. Based on our examination of the record, we conclude that Allnet has failed to make a persuasive showing that Michigan Bell's CCL rates were improperly calculated based on a misallocation of TRS and LTS payment obligations in violation of the Commission's Rules or the Communications Act.

10. In challenging Michigan Bell's computation and allocation of its TRS and LTS payment obligations, Allnet relies heavily upon its interpretation of the definitions of the terms "Level I Contributors" and "telephone com-

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[4] Beginning in 1991, Ameritech moved to regionally averaged rates. *See* Ameritech Transmittal No. 525, issued April 2, 1991.
[5] Complaint at 4, 5.
[6] Allnet Reply to Michigan Bell Brief at paras. 17, 21.
[7] *Id.* at paras. 17, 21.
[8] Michigan Bell Brief at 4-5.
[9] *Id.* at 6.
[10] *Id.* at 6-7.
[11] *Id.*
[12] Michigan Bell also maintains that Allnet's claim is barred under the doctrine of collateral estoppel because the Bureau rejected a similar claim in the *1989 Access Tariff Order*. In light of our substantive determination here that Allnet's complaint must be denied, we need not address the issue of collateral estoppel.

pany," as set out in Part 69 of the Commission's Rules.[13] Allnet argues, in effect, that Ameritech itself cannot be a telephone company, and, therefore, cannot act as a Level I contributor and collectively aggregate TRS and LTS costs on behalf of its individual operating companies.

11. Allnet's argument is not persuasive. The Commission's rules do in fact permit Ameritech to act jointly on behalf of its carrier subsidiaries, and these carriers in turn assume joint obligations with respect to TRS and LTS under their association with Ameritech.[14] As pointed out by Michigan Bell, the decision to withdraw from the NECA common line pool was not made by the individual Ameritech operating companies but, instead, by Ameritech itself under the Commission's affiliate withdrawal rule.[15] Thus, as Michigan Bell contends, if we were to read the TRS rules under Section 69.612(b)(i) as dealing exclusively with individual telephone companies, as Allnet urges, individual operating companies associated with regional holding companies would then be eligible for transitional support under certain circumstances.[16] This situation, however, never occurs because the regional holding companies are required to use aggregate operating company results to determine eligibility for any benefits or obligations under the rules.

12. Given the necessity for the regional holding companies to act collectively with respect to their individual operating companies, it becomes evident that, in reading the definition of "Level I Contributors," the plural term "telephone companies" must be interpreted to include a group of companies within a region. We note that Ameritech Tariff F.C.C. No. 2, the carrier common line tariff, was filed by Ameritech on behalf of its operating companies, just as the case with its Tariff F.C.C. No. 1. This is consonant with the Commission's treatment of Ameritech and other regional companies as the entities responsible for satisfying the requirements of Section 69.612. For example, in the *1989 Access Tariff Order*, the Bureau referred to Ameritech as a Level I Contributor.[17] It would be inconsistent for the Commission, once having charged Ameritech with a joint obligation with respect to TRS and LTS, to then deny it the discretion to aggregate the resultant payment obligation at a regional level. The only way a regional holding company, or a telephone company associated with a regional holding company, becomes eligible for certain support payments is if the overall regional common line revenue requirement so indicates. This determination, in effect, averages the revenue requirement of relatively high-cost and relatively low-cost telephone companies within a given region so that it is not possible, for example, for a company within a region to collect certain support payments based only on its own revenue recovery performance. Under these circumstances, we believe it is reasonable under the Communications Act and Commission rules for the company to compute its rates based upon the aggregated revenue requirement which corresponds to the basis on which the liability is incurred.

13. We also find unavailing Allnet's argument that even if regionalized aggregation of TRS and LTS obligations is permitted, the allocation method used by Ameritech, i.e., allocation based on the number of access lines per operating company, is unreasonably discriminatory within the meaning of Section 202(a) of the Act. This, in essence, is the same issue raised by complainant in connection with the 1989 access tariff filing made by Ameritech, *supra*. In that instance, the Bureau found that the method of allocation used was not unreasonable nor in violation of any Commission rules. Here, in reiterating that argument, complainant provides little basis to find this method of allocation unlawful, other than the conclusory claim that resultant Michigan Bell rates are too high. In particular, Allnet claims that the effect of the allocation used was to cause Michigan Bell ratepayers to pay a portion of the TRS and LTS costs which were incurred by Ameritech's other operating companies, thus constituting a subsidy. In reply, Michigan Bell points out, *inter alia*, that the relatively high level of Michigan Bell's CCL rates derives in major part from a recovery of inside wire costs rather than from the TRS and LTS allocation.[18] In any event, we are unable to discern any basis in the record for second guessing Ameritech's choice of access line counts as the basis for cost allocation, or for concluding that the resultant rate, which depended upon many other factors as well, was unreasonable or unduly discriminatory. Any method of allocating aggregated amounts involves approximations and averaging of costs. This is a normal part of common carrier ratemaking. It would be only in cases where the particular method of averaging or allocation chosen by a carrier violates Commission rules or orders, creates unreasonable results or otherwise has the effect of unreasonably disadvantaging one individual or group of individuals over others that such methodology would be disallowed. Allnet has presented no persuasive evidence or arguments that the particular method utilized by Ameritech in this is unreasonable case resulted in unreasonable rates within the meaning of Section 201(b) or unreasonably discriminatory rates under Section 202(a).

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[13] "Level I Contributors" are defined under Section 69.2(t) as:

> Telephone companies that are not association Common Line tariff participants, file their own Common Line tariffs effective April 1, 1989, and had a lower than average Common Line revenue requirement per minute of use in 1988 and thus were net contributors (i.e., had a negative net balance) to the association common line pool in 1988.

The term "telephone company" is defined under Section 69.2(hh) as:

> a carrier that provides telephone exchange service as defined in Section 3(r) of the Communications Act of 1934.

[14] *See*, for example, 47 C.F.R. § 69.3(e)(7). The rules do not permit companies to set access rates for regions smaller than a study area, which usually corresponds to a carrier's service area within a state, but permits aggregation at any higher level. *See* 47 C.F.R. § 65.702(c).

[15] Michigan Bell Reply Brief at 3.

[16] *Id.* at 4.

[17] *1989 Access Tariff Order*, 4 FCC Rcd at 3681.

[18] Michigan Bell Reply Brief at n.10.

V. CONCLUSION AND ORDERING CLAUSE

14. We find, based on the record before us, that Allnet has failed to show that defendant Michigan Bell violated the Communications Act or the Commission's rules by utilizing LTS and TRS obligation components that were calculated on an aggregate basis at the holding company level or, given that such aggregation was permissible, that the allocative mechanism used by Ameritech was unlawful or unreasonable. Michigan Bell's reliance on an aggregation of TRS and LTS costs at a regional level and its subsequent allocation of such costs on a per line basis were justifiable under our rules. We therefore deny Allnet's complaint.

15. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, and 206-209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, and 206-209, and authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the above-captioned complaint filed by Allnet Communication Services, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ares Microdevelopment, Inc. Farmington Hills, MI

NAL/Acct. No. 315HF0011

NOTICE OF APPARENT LIABILITY

Adopted: August 18, 1993; Released: August 25, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, ("the Act"), 47 U.S.C. § 503(b), to Ares Microdevelopment Inc. (Ares) for willful violation of Section 302(b) of the Act and Sections 2.803 and 15.101 of the Federal Communications Commission's (FCC or Commission) Rules, 47 C.F.R. §§ 2.803, 15.101. In November 1992, Ares advertised various 486 personal computers in a trade publication.[1] Commission records indicate that no grant of authorization was ever"issued to Ares for two of the 486 systems which were being advertised. Ares was sent a notice of violation concerning the advertisement. Ares continued to advertise the computers.

2. The appropriate amount of forfeiture for this violation is $14,000.

II. BACKGROUND

3. On November 30, 1992, the Equipment Authorization Branch, Authorization and Evaluation Division, of the Office of Engineering and Technology (OET) notified Ares of its possible violation of Commission Rules prohibiting the marketing, including advertising without disclaimers of equipment which has not been certified or properly authorized by the FCC. The OET also requested that Ares provide written statements, documentation or information regarding any possible grants of authorization for the disputed equipment or, in the alternative, regarding what steps were being taken to prevent further marketing of the equipment.

4. Ares did not respond to this notice within the 30 days allotted, and in fact, has yet to respond. In another advertisement appearing in the February 1993 issue of the same trade publication, Ares continued to advertise the unauthorized computers.

III. DISCUSSION

5. Section 2.803 of the Commission's Rules prohibits the sale, or offer for sale, or lease, including advertising for sale or lease, of equipment which is required to have, but has not been granted, type approval, type acceptance, certification or notification.[2] The requirement that the computer devices be certificated, is found under Section 15.101 of the Rules.

6. Since no conspicuous disclaimer was included in any of the advertisement of the two computers, Ares is deemed to have offered them for sale. Further, even after the November 30, 1992, Notice of Violation, Ares continued to advertise and otherwise offer the unauthorized equipment for sale.

7. Ares is a holder of various grants of equipment authorization and is familiar with the Commission's equipment authorization procedures. In August 1991, Ares was also cited for violating the Commission's Rules prohibiting the marketing of unauthorized equipment. At that time Ares was not assessed a forfeiture based on its assurances that the violations would not reoccur, and because of its prior history of compliance.

IV. CONCLUSION

8. Ares has violated Section 2.803 of the Rules. The violation was both willful and repeated.[3] Pursuant to our *1993 Policy Statement, Standards for Assessing Forfeitures*, FCC 93-382 (released August 12, 1993) the base amount of forfeiture for marketing unauthorized equipment is $7,000. Because the violation occurred on more than one day and

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[1] As a follow-up to a citation issued in August 1991 for a similar violation, and on which enforcement action had been deferred, the Commission's Equipment Authorization Branch placed a call to Ares' sales office to determine whether Ares continued to sell unauthorized equipment. Ares personnel quoted prices for the 486 system computers in question and agreed to send literature advertising and listing computers for sale. Two of the systems which Ares advertised were not authorized. Commission records indicated, and Ares admits, that no grants had been issued for the 486-66DX2 or the 486-50DX2 computers listed.

[2] This provision also provides that the advertising or display of a device will not be deemed an offer for sale or lease if the advertisement or display includes a conspicuous notice stating that the device has not been approved by the Commission, and may not be sold or leased until such approval is obtained.

[3] Section 312(f)(1) of the Communications Act, which also applies to Section 503(b)(*see Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991)) provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or Commission Rules.

Section 312(f)(2) of the Communications Act also provides:

> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

These definitions apply to Section 503(b) as well. *See* H.R. Rep. No. 97-765, 97th Cong. 2nd Sess. 50-51 (1982).

because of Ares's history of noncompliance, we are increasing the amount to $14,000. No further adjustments appear warranted.

V. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Act, and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, that Ares Microdevelopment, Inc., is APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $14,000 for marketing unauthorized equipment in violation of Section 302(b) of the Act and Section 2.803 of the Commission's Rules. The amount specified was determined after consideration of the factors set out in Section 503(b) of the Act.

10. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3), that Ares, shall, within, thirty (30) days of release of this Notice pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any statements regarding inability to pay must be supported by appropriate documentation.[4] Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
ATTN: NAL No. 315HF0011 Response
Room 744, Mail Stop No. AC/1500E3
1919 M Street, N.W.
Washington, D.C. 20554

Forfeitures shall be paid by check or money order made payable to the Federal Communications Commission. The remittance should be marked "Acct. No. 315HF0011" and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

11. IT IS FURTHER ORDERED that this notice shall be sent, by certified mail, to Ares Microdevelopment, Inc., 24762 Crestview Ct., Farmington Hills, MI 48335.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division

[4] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Woobang Corporation NAL/Acct No. 315HF0033
Youngdeungpo-Gu
Seoul, Korea

Liability for
Monetary Forfeiture

NOTICE OF APPARENT LIABILITY

Adopted: August 18, 1993; Released: August 25, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the Act), 47 C.F.R.§ 503(b), and 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, to the Woobang Corporation, grantee of FCC ID: JGHWB-900ATX for marketing the Child Search System device, a radio frequency device that was authorized under Part 15 of the Commission's Rules, in violation of Sections 2.931 and 15.231(e) of the Commission's Rules, 47 C.F.R. §§ 2.931, 15.231.

2. The appropriate amount of forfeiture for this violation is $7,000.

II. BACKGROUND

3. On March 2, 1993, an FCC investigator from the Chicago Office visited Davidcraft Corporation, a distributor of the Woobang Corporation's Child Search System device, and requested a sample of the device for post grant testing. Commission engineering personnel from the Sampling and Measurements Branch, Authorization and Evaluation Division, Office of Engineering and Technology (the FCC Laboratory), conducted tests on the sample, and found that it did not comply with radiated emissions limit and the periodic emissions limit required by Section 15.231(e).[1]

III. DISCUSSION

4. As a condition attendant to a grant of an equipment authorization, the grantee warrants that each unit of equipment marketed under a grant will be representative of the unit, and conform to the specifications of the unit that was measured for the grant. *See* 47 C.F.R. § 2.931. The Woobang Corporation was issued a grant under FCC ID: JGHWB-900ATX on September 9, 1992 to manufacture and market the Child Search System Transmitter.

5. Test measurements of the post-grant sample device indicated that the unit as marketed was not representative of the sample authorized by the Commission under the grant. The marketing of these non-conforming devices is prohibited by Section 2.803 of the Rules, 47 C.F.R. § 2.803, and may lead to revocation or withdrawal of the equipment authorization. *See* 47 C.F.R. §2.939.

IV. CONCLUSION

6. Pursuant to the Commission's policy for assessing forfeitures, *see 1993 Policy Statement, Standards for Assessing Forfeitures*, FCC 93-382 (released August 12, 1993), and Section 503(b)(2) of the Act, the base forfeiture amount for marketing devices in violation of Commission certification requirements under Sections 2.931 and 15.231(e) is $7,000.

7. The appropriate amount for this forfeiture is therefore $7,000. No further adjustments appear warranted.

V. ORDERING CLAUSES

8. Accordingly, pursuant to Section 503(b) of the Communications Act, and Section 1.80 of the Commission's Rules, IT IS ORDERED, that the Woobang Corporation IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of seven thousand dollars ($7,000) for willful violation of Section 302 of the Communications Act, and Sections 2.931, and 15.231(e) of the Commission's Rules.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, that the Woobang Corporation shall, within 30 days of release of this Notice pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any statements regarding inability to pay must be supported by appropriate documentation.[2] Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
ATTN: NAL No. 315HF0033
RM 744, Mail Stop AC/1500E3
1919 M Street, N.W.
Washington, D.C. 20554

[1] Radiated emissions at 3 meters were +8.5 dB, +10.0dB, and +12.5dB over the limit. Periodic emissions were 0.57 seconds in duration, with silent periods of 1.3 seconds between transmissions, less than the corresponding 17.1 seconds which would apply to a 0.57 second transmission time, and less than the 10 second minimum silent period allowed under. *See* 47 C.F.R. §15.231(e).

[2] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

Forfeitures shall be paid by check or money order made payable to the Federal Communications Commission.[3] The remittance should be marked "Acct. No. 315HF0033" and mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

10. IT IS FURTHER ORDERED that this notice shall be sent, by First Class mail, to the Woobang Corporation, Youngdeungpo-Gu, Seoul Korea.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division

[3] Payment must be drawn on a U.S. bank and denominated in U.S. dollars.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-90

In the Matter of

Amendment of Section 73.202(b), RM-8198
Table of Allotments,
FM Broadcast Stations.
(Toledo, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 9, 1993; Released: August 26, 1993

By the Chief, Allocations Branch:

1. At the request of AGPAL Broadcasting Co. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 2567 (1993), proposing the substitution of Channel 264C2 for Channel 264A at Toledo, Oregon, and the modification of Station KZUS' license to specify operation on the higher class channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted.[1] No other comments were received.

2. We believe the public interest would be served by substituting Channel 264C2 for Channel 264A at Toledo since it will provide the community with a wide coverage area FM service and enable Station KZUS to expand its service area. As proposed, we will also modify Station KZUS' license to specify operation on the higher class channel.

3. Channel 264C2 can be allotted to Toledo in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.9 kilometers (4.9 miles) northwest to avoid a short-spacing to Station KICE, Channel 264C1, Bend, Oregon.[2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 12, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Toledo, Oregon	264C2

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of AGPAL Broadcasting Co. for Station KZUS, Toledo, Oregon, IS MODIFIED to specify operation on Channel 264C2, in lieu of Channel 264A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, AGPAL Broadcasting Co., licensee of Station KZUS, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As requested, petitioner also complied with Section 1.52 of the Commission's rules by submitting a statement verifying that the information contained in its petition is true to the best of its knowledge.

[2] The coordinates for Channel 264C2 at Toledo are North Latitude 44-39-01 and West Longitude 124-01-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Philips Telecom Equipment Co.
New York, NY 10017

NAL/Acct. No. 315HF0031

NOTICE OF APPARENT LIABILITY

Adopted: August 18, 1993; Released: August 26, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture (NAL) issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), (the Act), to Philips Telecom Equipment Co. (Philips) for willful violation of Section 2.946 of the Commission's Rules, 47 C.F.R. §2.946.

2. The appropriate amount of forfeiture for this violation is $4,000.

II. BACKGROUND

3. As part of the Commission's post-grant sampling program, which is designed to ensure the compliance of various radio electronic devices on the market with applicable Commission Rules, the Commission may request samples of FCC authorized devices. *See* 47 C.F.R. §§2.943, 2.945. On March 24, 1993, the Commission's Columbia Laboratory, Sampling and Measurements Branch, wrote to Philips requesting that it submit, within 30 days of receipt of the letter, an unmodified production line sample of its Land Mobile Transmitter(s) authorized under FCC ID: GUCFM1100V.

4. Philips did not respond. On May 27, 1993, the Sampling and Measurements Branch again wrote to Philips, warning it of possible forfeiture and administrative penalties for failure to comply with the Commission's request for a sample of the GUCFFM1100V land mobile transmitter. Philips was given an additional ten (10) days in which to respond. To date, Philips has failed to respond.

III. DISCUSSION

5. Section 2.946 of the Commission's Rules states that "[a]ny party ... who markets equipment subject to the provisions of [Chapter 47] shall provide test sample(s) or data upon request by the Commission." This provision also states that failure to comply with such requests within sixty days may subject the party to a forfeiture. Since considerably more time than the alloted 60 days have elapsed with no response from Philips, we find that Philips has violated this provision of the Commission's Rules.

6. Pursuant to Section 503 of the Act, 47 U.S.C. §503, and our *1993 Policy Statement, Standards for Assessing Forfeitures*, FCC 93-382 (released August 12, 1993), the base forfeiture for this violation is $4,000. No adjustments appear warranted.

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, that Philips Telecom Equipment Company IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $4,000 for failing to respond to Commission correspondence or to submit the test sample requested by the Commission, in violation of Section 2.946 of the Commission's Rules.

8. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3), that Philips Telecom Equipment Company shall, within thirty (30) days of release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission.[1] Payment should be made by check or money order payable to the Federal Communications Commission, attention NAL/Acct. No. 315HF0031 and must be mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division, AC/1500E3
1919 M Street, N.W.
Washington, DC 20554
ATTN: NAL Response

9. IT IS FURTHER ORDERED that this Notice of Apparent Liability for Monetary Forfeiture shall be sent by certified mail, return receipt requested, to Philips Telecom Equipment Company, Radio Communication Division, 100 East 42nd Street, New York, NY 10017.

[1] Claims of inability to pay should be supported by tax returns or other financial statements prepared by generally accepted accounting principles for the most recent 3 years.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-234

In the Matter of

Amendment of Section 73.606(b), RM-8289
Table of Allotments,
TV Broadcast Stations.
(Boca Raton and Lake Worth, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 6, 1993; Released: August 26, 1993

Comment Date: October 18, 1993
Reply Comment Date: November 17, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed jointly by Palmetto Broadcasters Associated for Communities, Inc. ("Palmetto"), permittee of unbuilt noncommercial television Station WPPB-TV, Channel *63, Boca Raton, Florida, Fouce Amusement Enterprises, Inc. ("Fouce"), and Hispanic Broadcasting, Inc. ("HBI"), permittee of unbuilt commercial television Station WHBI-TV, Channel 67, Lake Worth, Florida (jointly referred to as "petitioners"). Fouce has an option to buy HBI's construction permit. Petitioners request the exchange of their channels of operation, pursuant to Section 1.420(h) of the Commission's Rules, and an exchange of their communities of license, pursuant to Section 1.420(i) of the Commission's Rules. If granted, this proposal would result in the operation of Station WPPB-TV by Palmetto on Channel *67 at Lake Worth and Station WHBI-TV by Fouce on Channel 63 at Boca Raton. In return for the exchange, Fouce pledges to provide consideration to Palmetto for operation of noncommercial Station WPPB-TV.

2. Section 1.420(h) allows a noncommercial educational television and a commercial television licensee or permittee to jointly petition for rule making to amend the Television Table of Allotments to exchange channels. The channel to be obtained by the noncommercial educational licensee or permittee would be reserved for noncommercial educational use and the channel acquired by the commercial licensee would be dereserved. Proposals must involve intraband channel changes, the stations involved must serve substantially the same market, and the proposal must serve the public interest. In addition, parties must offer assurances that any consideration resulting from the exchange will be devoted exclusively to activities related to the operation of the noncommercial educational television station. *See Intraband Television Channel Exchanges*, 59 RR 2d 1455 (1986), *recon. denied*, 3 FCC Rcd 2517 (1988).

3. Petitioners maintain that their proposal is consistent with this policy. First, they point out that both stations are in the UHF band and, therefore, an intraband channel change is proposed. Second, they maintain that the stations involved serve substantially the same market as contemplated by Section 1.420(h) of the Rules. Petitioners note that Boca Raton and Lake Worth are approximately 32 kilometers (20 miles) apart, and that both communities are in the same Metropolitan Statistical Area. They also note that the proposed exchange would permit Palmetto's Station WPPB-TV to place a city grade signal over both Lake Worth and Boca Raton, whereas the station could not presently place a city grade signal over both communities. Fouce's Station WHBI-TV, however, would place a signal only over Boca Raton, its proposed community of license. The parties state that Palmetto is contractually bound to use the proceeds from the exchange solely to build and operate Station WPPB-TV, and will make any showing required by the Commission with respect to this matter.

4. Petitioners also argue that the proposal will enhance the overall commercial service offered by WHBI-TV. They note that both stations are presently unconstructed. They argue that the site most recently proposed by HBI for Station WHBI-TV on Channel 67 would provide commercial television reception service to 1,444,404 persons, whereas the site proposed by Fouce for the operation of Station WHBI-TV on Channel 63 would result in the provision of commercial television reception service to 3,870,395 persons. Petitioners also argue that Station WPPB-TV's service would be enhanced. Petitioners note that at the site presently authorized, Station WPPB-TV on Channel *63, if constructed, would provide noncommercial television reception service to 3,796,413 persons. If the instant proposal is approved, the coverage of Station WPPB-TV would be 2,861,909 persons, as the transmitter site would be moved away from the Miami, Florida, area. However, petitioners argue that at its current site, Station WPPB-TV would provide no first or second noncommercial television reception service, but would provide a fourth noncommercial television reception service to 2,991,034 persons. If the instant proposal were approved, Station WPPB-TV would provide second noncommercial television reception service to 10,898 persons and third noncommercial reception service to 910,818 persons.

5. *Discussion.* Section 1.420(i) of the Commission's Rules governs changes in community of license. In order for a proposal seeking a change in community to be considered, the new allotment must be mutually exclusive with the existing allotment, the original community of license must not be deprived of its sole local transmission service, and the proposal must serve the Commission's allotment priorities and policies better than the allotment in the old community. *See Amendment of the Commission's Rules Regarding Modifications of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989) (*"Community of License R&O"*), *recon. granted in part*, 5 FCC Rcd 7094 (1990) (*"Community of License MO&O"*).[1]

[1] In addition, the *Change in Community MO&O* requires that permittees of unbuilt facilities must state in their petitions whether they obtained a construction permit in a comparative hearing and, if so, whether the petitioner sought decisionally significant preferences that would not have been granted had the comparative contest been for a station at the new proposed

In this instance, petitioners seek the dereservation of noncommercial Channel *63 at Boca Raton, the reservation of commercial Channel 67 at Lake Worth, the modification of the authorization for Station WPPB-TV, Channel *63, Boca Raton, to specify Channel *67, Lake Worth, and the modification of the authorization for Station WHBI-TV, Channel 67, Lake Worth, to specify Channel 63, Boca Raton. It would appear that the operation of commercial Channel 63 and reserved Channel *63 at Boca Raton, and commercial Channel 67 and reserved Channel *67 at Lake Worth, are in fact mutually exclusive. Furthermore, the proposal will not deprive either community of its sole local television transmission service, as each community will ultimately retain one television transmission service. In view of the fact that the proposed changes could result in enhanced service, including second noncommercial service to 10,898 persons in southern Florida, consideration of the change in community proposal is in the public interest.

6. Although we have a number of concerns that will be set forth below, we believe that the petitioners have submitted sufficient information to indicate that this proposal meets the criteria for consideration of an intraband television channel exchange and a change in community pursuant to Commission Rules 1.420(h) and (i), respectively. Accordingly, we believe the public interest would be served by soliciting comments regarding this proposal.

7. Petitioners allege that adoption of their proposal would allow Stations WPPB-TV and WHBI-TV to commence operation. We note that the original construction permits for Stations WPPB-TV and WHBI-TV were granted in 1985.[2] Since that date, Palmetto has requested four extensions of time to construct, was granted a construction permit to replace an expired permit, and requested one modification of the technical facilities specified in its permit. HBI has requested two extensions of time to construct, was granted a construction permit to replace an expired permit, and requested one modification of its technical facilities. Given the fact that the permits have been outstanding for almost eight years, we request petitioners to submit information sufficient to show that grant of this proposal will result in rapid initiation of service from both stations. Specifically, we request petitioners to submit evidence that the transmitter sites specified for each station are presently available and will remain available; that Fouce has sufficient financial ability to acquire the assets of HBI, fulfill its financial commitment to Palmetto and construct Station WHBI-TV; and that Fouce's payment to Palmetto will be sufficient to permit Palmetto to place Station WPPB-TV on the air and operate the station. In this vein, we request that petitioners submit a timetable showing the steps each party plans to take in implementing service on their respective stations and the approximate date that service will be implemented on each station. We also request petitioners to submit for the record in this docket copies of the agreement of Fouce and Palmetto regarding this transaction, particularly with regard to the consideration that will be paid upon grant of the proposal, as well as copies of Fouce's option to acquire HBI's assets, including the construction permit for Station WHBI-TV. Finally, we request Palmetto to state affirmatively that it will use any payment from Fouce resulting from this channel exchange solely for the construction and operation of Station WPPB-TV's facilities.

8. If the change in community is granted, Boca Raton (population 61,492) and Lake Worth (population 28,564) will each retain a television transmission service.[3] We note that neither station will be moving into an Urbanized Area, as both Lake Worth and Boca Raton are currently within the West Palm Beach, Florida, Urbanized Area. Therefore, grant of this proposal will not affect the net number of television transmission services in either community or within the West Palm Beach Urbanized Area. Furthermore, while we have stated that the public has a legitimate expectation that existing service will continue, and this expectation is a factor that must be weighed independently against the service benefits that may result from reallotting of a channel from one community to another,[4] neither station has been on the air.

9. This proposal is not affected by the Commission's current freeze on television petitions for rule making or construction permit applications for vacant allotments since this proposal involves an exchange of allotments, with no change in the overall number of allotments in the community and no new allotment will become available for application. *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service,* 52 Fed. Reg. 28346, July 29, 1989.

10. In summary, we believe the public interest would be served by proposing the allotment of commercial Channel 63 for noncommercial Channel *63 at Boca Raton and noncommercial Channel *67 for commercial Channel 67 at Lake Worth, as well as the modifications of the authorization for Station WPPB-TV, Channel *63, Boca Raton, to specify Channel *67, Lake Worth, and the authorization for Station WHBI-TV, Channel 67, Lake Worth, to specify Channel 63, Boca Raton.[5] Accordingly, we seek comments on the proposal to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, with respect to Boca Raton and Lake Worth as follows:

	Channel No.	
City	Present	Proposed
Boca Raton, Florida	*63	63
Lake Worth, Florida	67	*67

community. We will not accept petitions to change community of license before or during the first year of station operation if such a preference was awarded. Petitioners submitted statements indicating that HBI and Palmetto did not received decisionally significant preferences that would not have been granted had the comparative contest been for a station at the new proposed community.

[2] The original Station WPPB-TV construction permit was granted on October 23, 1985 (*see* File No. BPET-841013KH), and the original WHBI-TV construction permit was granted on October 7, 1985 (*see* File No. BPCT-840306KE).

[3] Population figures are from the 1990 U.S. Census.

[4] *See Community of License MO&O,* 5 FCC Rcd at 7097.

[5] Coordinates for Channel *67 at Lake Worth are 26-22-14 and 80-10-21, with a site restriction of 29.5 kilometers (18.3 miles) south. Coordinates for Channel 63 at Boca Raton are 25-58-15 and 80-12-32, with a site restriction of 43.7 kilometers (27.1 miles) south.

11. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

12. Interested parties may file comments on or before **October 18, 1993,** and reply comments on or before **November 17, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners' counsel, as follows:

Kevin C. Boyle
Elizabeth C. Brown
Latham and Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
(Counsel for Palmetto Broadcasters Associated for Communities, Inc.)

N. Frank Wiggins
Venable Baetjer Howard and Civiletti
1201 New York Avenue, N.W.
Suite 1000
Washington, D.C. 20005
(Counsel for Fouce Amusement Enterprises, Inc.)

Hispanic Broadcasting, Inc.
2203 N.E. 203rd Terrace
North Miami Beach, Florida 33180
(Permittee of Station WHBI-TV)

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.606(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

14. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before

the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Various Locations)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 6, 1993; Released: August 26, 1993

By the Chief, Allocations Branch:

1. This *Order* amends Section 73.202(b) of the Commission's Rules, the Table of FM Allotments, to specify the classes of channels allotted to various communities. These amendments are necessary to reflect changes that have been authorized in response to applications filed by licensees and permittees operating on these channels. This action is taken pursuant to *Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment,* 4 FCC Rcd 2413 (1989). The attached Appendix shows the Table, as amended for those communities.

2. This action constitutes an editorial change in the Table of FM Allotments. Therefore, a public notice and comment proceeding is unnecessary. *See* 5 U.S.C. 553(b)(A) and (B).

3. For further information concerning this proceeding, contact Michael C. Ruger, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

Community	Channel Deleted	Channel Added
Kodiak, Alaska	266C2	266A
Batesville, Arkansas	226C	226C1
North Crossett, Arkansas	274C2	274C3
Springdale, Arkansas	285C2	285A
Van Buren, Arkansas	274C2	274C3
Seaside, California	296B1	296A
Tipton, California	285B1	285A
Fort Collins, Colorado	300C	300C1
Panama City, Florida	300C	300C1
Tampa, Florida	284C	284C1
Saipan, Garapan	258C	258C1
Blackshear, Georgia	286C2	286C3
Lanai City, Hawaii	284C	284C2
Downs, Kansas	231C	231C2
Norton, Kansas	294C1	294A
West Monroe, Louisiana	252C1	252C2
Charlevoix, Michigan	290C	290C1
Red Wing, Minnesota	290C2	290C3
Meridian, Mississippi	267C	267C1
West Point, Nebraska	300C1	300C2
Elko, Nevada	237C	237C1
White Rock, New Mexico	266C2	266C3
Valley City, North Dakota	266C1	266C2
Wishek, North Dakota	262C	262C1
Altus, Oklahoma	300C2	300A
Rogue River, Oregon	234C3	234A
Wichita Falls, Texas	225C	225C1
Wichita Falls, Texas	277C	277C1
Winfield, Texas	249C2	249C3
Deer Park, Washington	296C2	296C3
Medical Lake, Washington	270C2	270C3
Clintonville, Wisconsin	222C3	222A
Hayward, Wisconsin	222C3	222A
Minocqua, Wisconsin	240C1	240C3

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-236

In the Matter of

Amendment of Section 73.202(b), RM-8306
Table of Allotments,
FM Broadcast Stations.
(Tulelake, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 9, 1993; Released: August 26, 1993

Comment Date: October 18, 1993
Reply Comment Date: November 17, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Wynne Broadcasting Company, Inc. ("petitioner), permittee of Station KFLS-FM, Channel 243C2, Tulelake, California, seeking the substitution of Channel 243C for Channel 243C2 and modification of its construction permit accordingly to specify operation on the higher powered channel. Petitioner stated its intention to apply for Channel 243C if allotted to Tulelake, as requested.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 243C for Channel 243C2 at Tulelake since it could provide an expanded coverage area FM service to the community. Channel 243C can be allotted to Tulelake at the petitioner's currently authorized transmitter site, located 20.4 kilometers (12.7 miles) northwest of the community,[2] in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

3. The petitioner's modification request at Tulelake conforms with the provisions of Section 1.420(g) of the Commission's Rules. Therefore, we shall propose to modify the permit for Station KFLS-FM without entertaining competing expressions of interest in the use of Channel 243C at Tulelake, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Tulelake, California, as follows:

	Channel No.	
City	Present	Proposed
Tulelake, California	243C2	243C

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 18, 1993,** and reply comments on or before **November 17, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Wynne Broadcasting Company, Inc.
Attn: Robert Wynne, President
1338 Oregon Ave.
P.O. Box 1450
Klamath Falls, OR 97601

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of

[1] Although petitioner's request was signed, it failed to include an affidavit verifying that the statements contained in the petition are accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes,* 5 FCC Rcd 3911, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[2] The coordinates for requested Channel 243C at Tulelake, California, are 42-05-50 and 121-37-59.

any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-237

In the Matter of

Amendment of Section 73.202(b), RM-8312
Table of Allotments,
FM Broadcast Stations.
(Jeffersonville, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 9, 1993; Released: August 26, 1993

Comment Date: October 18, 1993
Reply Comment Date: November 17, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Michael S. Celenza ("petitioner") requesting the allotment of Channel 271A to Jeffersonville, New York, as the community's second local commercial FM service. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 271A to Jeffersonville since an interest has been expressed in providing the community with an additional local service. Channel 271A can be allotted to Jeffersonville in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence in the allotment is required since Jeffersonville is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Jeffersonville, New York	291A	271A, 291A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 18, 1993,** and reply comments on or before **November 17, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James K. Edmondson, Esq.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 271A at Jeffersonville are North Latitude 41-46-51 and West Longitude 74-56-03.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-238

In the Matter of

Amendment of Section 73.202(b), RM-8305
Table of Allotments,
FM Broadcast Stations.
(Templeton, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 9, 1993; Released: August 26, 1993

Comment Date: October 18, 1993
Reply Comment Date: November 17, 1993

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed by Radio Representatives, Inc. ("petitioner") requesting the allotment of FM Channel 263A to Templeton, California, as that community's first local FM service.[1] Petitioner stated an intention to apply for Channel 263A if it is allotted to Templeton, as requested.[2]

2. In support of the proposal, petitioner states that Templeton is listed as a Census Designated Place by the Census Bureau, which attributes it with a population of 2,887 persons.

3. A staff review of the proposal reveals that Channel 263A can be allotted to Templeton consistent with the minimum distance separation requirements Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 3.3 kilometers (2 miles) north[3] of the community to avoid a short-spacing to Station KRQK(FM), Channel 262B1, Lompoc, California.[4]

4. We believe the public interest would be served by proposing the allotment of Channel 263A to Templeton, California, since an interest has been expressed in providing a first local FM service to the community. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Templeton, California, as follows:

City	Channel No. Present	Proposed
Templeton, California	--	263A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 18, 1993,** and reply comments on or before **November 17, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners, as follows:

Radio Representatives, Inc.
Attn: Gloria Dawn Patterson
1416 Hollister Lane
Los Osos, CA 93402

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply

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[1] A construction permit has been issued to William L. Zawilla to operate daytime Station KXER(AM), in Templeton (File No. BP-851126AF).

[2] Although petitioner's request was signed by its Secretary, and an address given, it did not provide an affidavit verifying that the statements contained in the petition are accurate to the best of its knowledge. While a petitioner may seek assistance in the preparation of a pleading or petition for rule making, Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the commenting or petitioning party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes,* 5 FCC Rcd 3911, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[3] The coordinates used for Channel 263A at Templeton are 35-34-45 and 120-42-41.

[4] Coordinates at the licensed site of Station KRQK(FM) are 34-44-30 and 120-26-45.

comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-226

In the Matter of

Revision of 47 C.F.R. § 73.208,
Reference Points and Distance
Computations

NOTICE OF PROPOSED RULE MAKING

Adopted: July 27, 1993; Released: August 27, 1993

Comment Date: October 18, 1993
Reply Comment Date: November 2, 1993

By the Commission:

1. The Commission hereby seeks comment on a proposal to modify Section 73.208(c)(8) of the Commission's Rules to specify the manner in which applicants for FM facilities may round off distances when computing the extent to which they are short-spaced.

2. Section 73.208(c)(8) of the Commission's Rules provides that the computed distance between two reference points shall be rounded off to the nearest kilometer. In *Naguabo Broadcasting Company*, 7 FCC Rcd 1696 (1992), the Commission analyzed the use of the rounding-off provision in the context of determining whether to grant a waiver of the Commission's minimum distance separation requirements set forth in Section 73.207 of the Rules. The Commission concluded that the proper use of the rounding-off provision was unclear in this context.[1] Prior to *Naguabo Broadcasting Company*, it was Mass Media Bureau practice, when processing FM applications, not to employ the rounding provision of Section 73.208 in determining the extent to which an applicant is short-spaced.

3. An applicant is entitled to demonstrate compliance with minimum distance separation requirements (*e.g.*, Section 73.207, Section 73.213(c), Section 73.215(e)) by rounding off to the nearest kilometer (km) the distance between its proposed transmitter site and a particular reference point (*e.g.*, the transmitter site of an existing co-channel or adjacent channel station). We propose no change to our rules in this regard. However, the Commission believes that its rules should be amended to specify that if the applicant is unable to demonstrate such compliance by virtue of the rounding-off provision in Section 73.208, the extent to which it is short-spaced should be specified with greater precision.

4. Our fundamental policy objective of controlling spectrum crowding would be enhanced, we believe, if distances were specified with greater precision than 1 km in evaluating short spacing waiver requests pursuant to Section 73.207(a) of the Commission's Rules.[2] For example, a station short-spaced by 1.51 km could further decrease the spacing by an additional 0.98 km, because 1.51 km and the resulting 2.49 km both round to the same 2 km distance. Such a degradation in spacing, particularly in the case of short-spaced stations, could result in substantial interference. Furthermore, the degree to which further short spacing could occur utilizing the rounding rule varies inconsistently from station to station, depending on the initial extent of short spacing. Thus, in the above example, a further short spacing of almost 1 km would be permissible. However, a station short spaced by 1.49 km, which rounds to 1 km, would be prohibited from making even a 0.02 km relocation in the direction of the short spaced station because the resulting short spacing would round to 2 km. Such inconsistencies would frustrate our efforts to control objectionable interference within the FM broadcast spectrum by means of spacing criteria and would introduce an unacceptable level of arbitrariness into our licensing process.

5. We propose to amend Section 73.208(c)(8) to restrict rounding of distance separation calculations to the nearest one hundredth of a kilometer (two decimal places) in instances where an applicant is not in compliance with any of our minimum distance separation requirements (*e.g.*, Sections 73.207, 73.213(c), 73.215(e)). This would significantly reduce the potential for interference and the inconsistencies from station to station illustrated in the examples set forth above. This degree of rounding yields a precision of 10 meters, which more closely conforms to the degree of precision associated with our requirement that transmitter site coordinates be specified to the nearest second.

PROCEDURAL MATTERS

Ex Parte Considerations

6. This is a nonrestricted notice and comment rule making proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally*, 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

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[1] In *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, 6 FCC Rcd 5356, 5360 (1991), the Commission denied a request to reinstate consideration of Section 73.207 waivers. Consequently, it is unlikely that a situation similar to that in *Naguabo Broadcasting Company* will reoccur. Nevertheless, for the reasons that follow, there remains justification for limiting the circumstances under which distances may be rounded.

[2] Section 73.207(a) states, in part:

> applications to modify the facilities of stations with short-spaced antenna locations authorized pursuant to prior waiver of the distance separation requirements may be accepted, provided that such applications propose to maintain or improve that particular spacing deficiency.

Comment Information

7. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **October 18, 1993,** and reply comments on or before **November 2, 1993**. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W. Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

8. *Reason for the Action:* This action is taken to clarify that applicants for FM facilities may not round off distances to the nearest km under Section 73.208 of the Commission's Rules when computing the extent to which they are short-spaced.

9. *Objective of this Action:* By this action, the Commission seeks to clarify and rationalize the use of Section 73.208 of the Commission's Rules.

10. *Legal Basis:* Authority for this action is found in Sections 4, 303, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 4, 303, 403.

11. *Number and Type of Small Entities Affected by the Proposed Action:* All applicants for FM facilities that propose transmitter sites which are not in compliance with the Commission's minimum distance separation rules.

12. *Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Action:* None.

13. *Federal Rules which Overlap, Duplicate or Conflict with the Proposed Action:* None.

14. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action:* We are seeking comment to determine whether any significant alternatives exist.

15. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposal suggested in this document. Written public comments are requested on the IRFA, which is set forth as Appendix A. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with ¶ 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Paperwork Reduction Act Statement

16. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new or modified information collection requirement on the public.

Ordering Clause

17. Accordingly, IT IS ORDERED that pursuant to Sections 4, 303, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 4, 303, 403, this *Notice of Proposed Rule Making* IS ADOPTED.

Additional Information

18. For further information on this proceeding, contact Gary P. Schonman, Mass Media Bureau, (202) 632-6402.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

PROPOSED AMENDMENT

Title 47 of the Code of Federal Regulations, Part 73, is proposed to be amended as follows:

Part 73 - Radio broadcast services

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

2. § 73.208(c)(8) is revised to read as follows:

§ 73.208 Reference points and distance computations

* * * * *

(c) ***

(8) Round the distance to the nearest kilometer. However, if, after rounding the distance to the nearest kilometer, an applicant is not in compliance with any Commission minimum distance separation requirement (*e.g.*, §§ 73.207, 73.213(c), 73.215(e)), the extent to which it is short-spaced shall be specified to the nearest one hundredth of a kilometer (two decimal places).

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-554

In the Matter of:

Local Exchange Carrier
Access Tariff Rate Levels

Bell Atlantic Transmittal No. 284
Telephone Companies
Tariff F.C.C. No. 1

GVNW Inc./Management Transmittal No. 21
Bourbeuse Telephone Company
Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: August 16, 1993; Released: August 27, 1993

By the Commission:

I. BACKGROUND

1. In September 1988, the Commission moved the effective date of the local exchange carriers' (LECs') annual 1989 access service tariff filings from January 1 to April 1, 1989. That decision extended the effective period for the LECs' 1988 access tariff rates for an additional three months.[1] The Commission then directed the LECs to maintain their earnings within the 12.0 percent prescribed rate of return during that extended rate period and directed the Bureau to make any necessary adjustments in carriers' rates if they failed to do so themselves.[2]

2. Although many LECs reported for the first six months of 1988 actual earnings that were in excess of the prescribed rate of return, only a few LECs filed rate reductions. The Bureau therefore ordered 24 LECs (those that reported earnings in excess of the 12.25 percent maximum allowable rate[3] during the first six months of 1988) to file tariffs retargetting their access rates to 12.0 percent, effective no later than January 1, 1989, or to show cause why they should not be required to do so.[4]

3. In response to the *Show Cause Order*, twenty of the subject LECs filed tariff reductions, including The Bell Atlantic Telephone Companies (Bell Atlantic) and GVNW Inc./Management, the Bourbeuse Telephone Company (Bourbeuse). In an order released December 30, 1988, the Bureau concluded that Bell Atlantic's and Bourbeuse's reductions may not have been sufficient to eliminate the overearnings.[5] The Bureau further concluded in the *December 1988 Order* that Bell Atlantic's Transmittal No. 284[6] and Bourbeuse's Transmittal No. 21[7] provided insufficient information to enable the Bureau to determine whether their rates of return would be reduced to 12 percent.[8] Instead, both carriers represented that their cost support for their 1989 annual access filing, to be filed two days after release of the *December 1988 Order*, would demonstrate that their transmittals sufficiently reduced their rates. Accordingly, the Bureau allowed the transmittals to take effect on a temporary basis, pending further review of the information to be filed in the annual access filing. In addition, the Bureau suspended the transmittals for one day and required Bell Atlantic and Bourbeuse to account for all revenues earned as a result of the transmittals.[9] Given the carriers' referral to their 1989 annual access filing cost support, the Bureau did not subsequently establish a pleading cycle or designate issues for further study. No party filed pleadings regarding Bourbeuse's rates. We have reviewed the cost data subsequently filed by Bourbeuse to support those rates and conclude that the rates at issue were not unreasonable. Accordingly, the proceeding relating to Bourbeuse's rates is now terminated.

4. On March 30, 1989, Bell Atlantic filed an application for review of the Bureau's *December 1988 Order*, requesting that the Commission rescind that order.[10] Bell Atlantic argues that the Communications Act does not authorize imposing an accounting order when a transmittal establishes rate reductions, only rate increases, and that the Bureau's order therefore cannot provide a sufficient basis for ordering rate adjustments or refunds.[11]

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[1] The termination date of the LECs' 1988 access tariff rates was changed from December 31, 1988, to March 31, 1989. Access Tariff Filing Schedules, CC Docket No. 88-326, 3 FCC Rcd 5495 (1988) (*Tariff Filing Deferral Order*).

[2] *Id.* at 5496.

[3] *See* Section 65.700 of the Commission's Rules, 47 C.F.R. § 65.700.

[4] Local Exchange Carrier Access Tariff Rate Levels, 4 FCC Rcd 762 (Com. Car. Bur. 1988) (*Show Cause Order*).

[5] Local Exchange Carrier Access Tariff Rate Levels, 4 FCC Rcd 682-83 (Com. Car. Bur. 1988) (*December 1988 Order*).

[6] Bell Atlantic Transmittal No. 284, filed December 12, 1988. In this transmittal, Bell Atlantic sought to reduce its access rates by 3 percent. Because Bell Atlantic asserted that there was insufficient time to develop the full cost support required under Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, the Bureau granted Bell Atlantic a partial waiver of that requirement and allowed it to submit partial cost support for the transmittal. Bell Atlantic stated that it would be filing the same rates, with a few possible adjustments, for its 1989 annual access filing, effective April 1, 1989. The carrier thus promised that the cost support filed with its 1989 annual access filing would fully support the rates filed under Transmittal 284, as well. *See* Bell Atlantic Transmittal No. 284 Description and Justification at 1-2, 4-5.

[7] GVNW Inc./Management, Bourbeuse Telephone Company, Tariff F.C.C. No. 1, Transmittal No. 21, filed December 12, 1988.

[8] *December 1988 Order*, 4 FCC Rcd. at 682.

[9] *Id.* at 683-84.

[10] Because the Common Carrier Bureau issued a public notice on February 2, 1989 that extended the pleading cycle for applications for review of the *December 1988 Order*, Bell Atlantic's filing was timely. No oppositions were filed against Bell Atlantic's application.

[11] Bell Atlantic Application for Review at 1-2.

II. DISCUSSION

5. As discussed in note 10, *supra*, Bell Atlantic stated in Transmittal 284 that it did not plan any further rate reductions and that the cost support filed with its 1989 annual access filing would fully support, with a few possible adjustments, the rates filed under Transmittal 284, as well. However, the rates that Bell Atlantic filed in January 1989, to be effective April 1, in fact further reduced the rates filed in Transmittal 284 by about 3 percent. Moreover, the cost support data Bell Atlantic filed in January indicated that a further reduction of $13.846 million in January-March 1989 traffic sensitive revenues would have been necessary to ensure that Bell Atlantic's rates for that period did not exceed the authorized rate of return.[12] (Bell Atlantic subsequently reported a 13.98 percent rate of return in its Form 492 report for the January-March 1989 period.) Indeed, the Bureau determined that even this additional 3 percent reduction would produce earnings in excess of the 1989 authorized rate of return.

6. This Commission concludes, based on the record in this proceeding, that Bell Atlantic earned in excess of the authorized rate of return for the three month period between January 1 and March 31, 1989.[13] However, after examining annual and two-year rate of return reports for the period beginning January 1, 1989, we conclude that Bell Atlantic actually earned below the authorized rate during these other time periods. In particular, Bell Atlantic reported a rate of return that was .07 percent below the authorized rate for the two-year annual access rate monitoring period beginning January 1, 1989, or underearnings of $3.492 million, even though revenues earned in excess of the authorized rate under Transmittal 284 were included.[14] Moreover, Bell Atlantic's annual earnings level for the year January 1 to December 31, 1989, including Transmittal 284 revenues, was 1.05 percent below the authorized rate of return and reflected underearnings of $18.766 million.

7. In light of our analysis of Bell Atlantic's rates of return during these other time periods, this Commission concludes that no further proceedings need be conducted because no refund would be warranted. Section 204 of the Act allows the Commission considerable discretion regarding whether to order rate refunds from carriers.[15] In these circumstances, where the proceeding requiring Bell Atlantic to file the transmittal at issue was begun to ensure compliance with this Commission's rate of return prescription, and Bell Atlantic's earnings for the relevant annual period and the monitoring period were below the authorized rate of return, we exercise our discretion not to order any refunds based on Bell Atlantic's reported overearnings. Consequently, we need not reach the issue posed by Bell Atlantic regarding this Commission's authority to order adjustments or refunds of rate reductions.

8. Finally, because Bell Atlantic's application for review of the *December 1988 Order* was predicated on the assumption that the Bureau would order a refund of the overearnings received as a result of Transmittal 284, we conclude that our decision not to begin an investigation or to order a refund renders moot its application. Consequently, we dismiss that application as moot.

III. CONCLUSION AND ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that this proceeding examining GVNW Inc./Management, Bourbeuse Telephone Company, Tariff F.C.C. No. 1, Transmittal No. 21, IS TERMINATED.

10. IT IS FURTHER ORDERED that this proceeding examining Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 284, IS TERMINATED.

11. IT IS FURTHER ORDERED that the application for review of the Common Carrier Bureau's *December 1988 Order* filed by the Bell Atlantic Telephone Companies IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[12] Annual 1989 Access Tariff Filings, Memorandum Opinion and Order, 4 FCC Rcd 3638 (Com. Car. Bur. 1989) (*1989 Access Order*).

[13] This Commission calculates that Bell Atlantic overearned $11.615 million dollars, based on a 13.98 percent rate of return, well in excess of the authorized 12 percent rate for the extended rate period, January 1 to March 31, 1989.

[14] The Commission's Rules provide that annual access rates be reviewed over two-year monitoring periods for the purposes of ordering refunds of overearnings. Section 65.701 of the Commission's Rules, 47 C.F.R. § 65.701.

[15] Section 204 [of the Communications Act, 47 U.S.C. § 204,] grants the Commission authority to investigate rates. Section 204 also grants the Commission broad discretion in fashioning remedies if it finds as a result of investigation that particular rates are not justified, including discretion to determine whether, and on what basis, refunds should be ordered. Investigation of Special Access Tariffs of Local Exchange Carriers, 5 FCC Rcd 1717, 1721 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Petition of

AMERICAN PAGING, INC. MSD-92-33

Request for a Declaratory Ruling
Concerning Preemption of State
Regulation for Multistate Paging
Service on Frequency 931.4875 MHz

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 1993; Released: August 27, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Before the Bureau is a Request for Declaratory Ruling filed by American Paging, Inc. (API) that its proposed provision of interstate paging, on frequency 931.4875 MHz, throughout several states including Florida, Georgia, Alabama, Louisiana, North Carolina and South Carolina, is jurisdictionally interstate and subject to federal jurisdiction. In response to API's petition, the Commission issued Public Notice No. 30044 (released October 6, 1992) seeking comments from interested parties. An opposition to API's request was filed by Radiofone, Inc. (Radiofone) and comments to the petition were submitted by American Mobilphone, Inc. (AMI). Reply comments were filed by API, Radiofone and Metromedia Paging Services, Inc. (Metromedia Paging).[1] For the reasons stated below, we deny API's request for declaratory ruling.

II. CONTENTIONS

2. In its request, API states that it began providing satellite-controlled statewide paging service in the state of Florida in October 1991. With more than fifteen thousand paging units in service there and more that one hundred and twenty operational transmitters, API now would like to extend coverage to Georgia, Alabama, Louisiana, North Carolina and South Carolina.[2] API contends that its proposed service is not unlike that of Mobile Telecommunications Technologies Corporation (MTel) outlined in a *Memorandum Opinion and Order*, 6 FCC Rcd 1938 (Com. Car. Bur. 1991) *affirmed*, 7 FCC Rcd 4061 (1992). API will link existing and proposed paging transmitters by satellite and each regional page will be transmitted simultaneously by all of its 931.4875 MHz transmitters. API maintains that because of this system design it cannot know where any particular page is received. It further states that its satellite multistate paging service will be offered at a premium rate higher than the rate it now charges for local service. Thus, API reasons, any local or intrastate service within its regional service offering would be purely incidental. In addition, API states that it will continue to offer a separate local or intrastate paging service on the same frequency in those states where it has state certification.

3. In support of its request, API cites the Commission's decision in *MTel, supra*. There the Commission upheld a Bureau decision that determined paging frequency 931.4375 MHz could be used for multistate paging, without state certification where the interstate and the intrastate components of the service are technically and practically infeasible to separate. Since its proposed multistate paging system is technically similar to MTel's, API requests that the Commission preempt state regulation for its multistate service consistent with its *MTel* decision.

4. In its comments, AMI claims that API's proposed service is materially distinguishable from that of MTel and that its petition does not warrant a grant. In contrast to MTel's detailed explanation of how its nationwide system would operate, AMI maintains that API has presented only cursory facts to justify its request and has not made the factual showings given by MTel in its request for declaratory ruling. For example, AMI argues that MTel a) was already offering a nationwide service on 929.9375 MHz with over 62,000 pagers able to receive service in 150 markets; b) that all its customers were and always had been signed up for interstate services costing $25 to $50 per month per pager more than intrastate paging services; c) that MTel would use the same switch for its expanded service on frequency 931.4375 MHz as it used for existing service on frequency 931.9375 MHz and that only subscribers using the higher-priced interstate service would be allowed to use the frequency; and d) lower-priced intrastate paging service would only be offered where MTel had state certification, and only on a frequency separate from the nationwide frequency. On the other hand AMI argues, API has admitted that it would continue to use the same radio channels to offer lower-priced intrastate paging and has never explained how the pages of those subscribers selecting only the intrastate paging services would be transmitted on less than all of its co-channel transmitters.

5. Radiofone opposes API's petition arguing that API wants the Commission to summarily preempt Georgia, Alabama, Louisiana, North Carolina, South Carolina, Tennessee and/or Mississippi from regulating API's proposed 931.4875 MHz paging service before any of the state commissions has an opportunity to consider whether or how it will regulate API's proposed service. Radiofone stresses that API has not applied for certification in any of the seven states. The requested preemption, Radiofone claims, would disrupt the dual federal-state regulatory system. The ap-

[1] API filed a Motion To Strike the reply comments of Radiofone arguing that the Public Notice authorized only the petitioner to file reply comments. Radiofone opposes the motion arguing that state commissions had not been given effective notice of API's petition and pointing out API's statement that it will continue to offer intrastate service. We will treat Radiofone's reply comments as informal comments.

[2] API has received authorization to use frequency 931.4875 MHz on its regional paging system in Florida and at one location in Georgia. It has applications pending for the frequency in Alabama, Georgia, Louisiana, North Carolina and South Carolina.

plicable judicial precedent for this case, it contends, is *Louisiana Public Service Commission v. FCC*, 106 S. Ct. 1890 (1986), not the Commission's decision in *MTel.*[3]

III. DISCUSSION

6. It is well established that the Commission may preempt state regulation of intrastate service when "it is not possible to separate the interstate and the intrastate components of the asserted FCC regulation." *Louisiana PSC v. FCC*, 476 U.S. at 375 n.4. In construing the "inseparability doctrine" recognized by the Supreme Court in *Louisiana PSC*, federal courts of appeal have held that where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service may be preempted where the state regulation thwarts or impedes a valid federal policy. *See NARUC V. FCC*, 880 F.2d 422 (D.C. Cir. 1989); *Illinois Bell Telephone Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989); *Public Utility Com'n of Texas v. FCC*, 886 F. 2d 1325 (D.C. Cir. 1989); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

7. In the instant case, API has stated that all paging traffic for its proposed regional service will be transmitted simultaneously via satellite to transmitters in at least six states. API claims that for its proposed multistate service it will be impossible to know the state in which any particular page is received; that any intrastate paging calls will be incidental and unintended; and that its interstate service will be offered at a premium rate. API also claims that it will only offer a separate local paging service in states where it has state certification. On the record before us, we find API's proposed service distinguishable from MTel's. API has not explained how its interstate service will be separated from its intrastate service offered on the same frequency. Nor has API explained how the design of its system makes it technically and practically infeasible to separate the interstate paging calls from the incidental intrastate paging signals. We agree with AMI that API has presented only cursory information to support its request and has not made a detailed factual showing sufficient to support a preemption finding, as with MTel.

8. Here, API has stated that it will continue to offer local paging service, as a discrete offering in those states where it has received state certification. (*See* API Request, p.5, n.4; Reply Comments, p.7, n.4). Although API is not prohibited from offering both services, it simply has not given specific technical information regarding its system design from which we can conclude that it is impossible or infeasible for API to separate incidental intrastate traffic from its interstate traffic for its multistate service offering. Likewise, API has failed to explain how its discrete local service would be separated from its proposed interstate offering. Accordingly, we find that based on the record before us, API's request must be denied.

9. We conclude that API has failed to make an adequate showing that preemption of state entry, technical and rate regulation of its proposed regional, multistate paging service on frequency 931.4375 MHz is warranted.

IV. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's rules, that the request for declaratory ruling filed by American Paging, Inc. (MSD-92-33) IS DENIED.

11. IT IS ALSO ORDERED, that the Opposition of Radiofone, Inc. and the Comments of American Mobilphone, Inc. ARE GRANTED.

12. IT IS ALSO ORDERED, that the Motion to Strike, filed by American Paging, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

[3] In its reply comments, Metromedia Paging generally supports API's request and maintains that the Commission should rule that all similarly situated public land mobile licensees are providing jurisdictionally interstate service.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-316

In the Matter of

Amendment of Section 73.202(b), RM-7059
Table of Allotments,
FM Broadcast Stations.
(Rocky Mount, North Carolina)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 20, 1993; Released: August 27, 1993

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for reconsideration filed jointly by New East Communications, Inc., licensee of Station WCZI-FM, Channel 252A, Washington, North Carolina, and Roanoke Chowan Broadcasting Corporation, licensee of Station WBCG(FM), Channel 252A, Murfreesboro, North Carolina ("New East and Roanoke"), of the *Report and Order* in this proceeding, 6 FCC Rcd 2153 (1991). Radio Triangle East Company ("Radio Triangle"), licensee of Station WSAY-FM, Channel 253A, Rocky Mount, North Carolina, filed an opposition, and New East and Roanoke filed a response. For the reasons discussed below, we will deny New East and Roanoke's petition for reconsideration.

2. *Background.* Radio Triangle filed a petition for rule making requesting the substitution of Channel 253C3 for Channel 253A at Rocky Mount and the modification of its authorization for Station WSAY-FM accordingly. New East and Roanoke filed an opposition in response to the *Notice of Proposed Rule Making*, 5 FCC Rcd 3827 (1990), seeking comments on the proposal. First, they claimed that Radio Triangle's proposal, if adopted, would violate Section 73.207(a) of the Commission's Rules, which specifies minimum distance separation requirements. They recognized that Radio Triangle's proposal was accepted for consideration under the minimum distance separation rules in effect prior to October 2, 1989, the effective date of the new minimum distance separation rules adopted in conjunction with the change in the Commission's rules to permit certain Class A stations to increase maximum power from three to six kilowatts.[1] However, they argued that permitting the filing of petitions for new allotments under the "old" minimum distance separation requirements from August 19, 1989, the date the *Six Kilowatt Order* was adopted, until October 2, 1989, when existing Class A stations could file applications specifying six kilowatt operation, disadvantaged the stations that the new rules were designed to assist. Second, they argued that the upgrade would result in economic injury to their stations because Stations WCZI-FM and WBCG(FM) would be precluded from operating with six kilowatt Class A facilities. Third, they argued that their pending applications to increase the operating power of their Washington and Murfreesboro stations to six kilowatts[2] should be treated as counterproposals to this proceeding and examined under the allotment priorities.[3] New East and Roanoke claimed that as six kilowatt Class A stations, Stations WCZI-FM and WBCG(FM) would provide an additional aural reception service to 21,584 persons, and that Station WBCG(FM) would provide a third full-time aural reception service to 309 persons, a fourth full-time aural reception service to 1,699 persons and a fifth full-time aural reception service to 2,462 persons. In contrast, they claimed, operation of Station WSAY-FM as a Class C3 facility would provide an additional aural reception service to 45,931 persons and a fourth full-time aural reception service to 797 persons. They argued that the provision of a new third, fourth and fifth aural reception service by Station WBCG(FM) should outweigh the difference in population gains, citing *Greenup, Kentucky and Athens, Ohio ("Greenup")*, 4 FCC Rcd 3843 (1989), *aff'd in relevant part*, 6 FCC Rcd 1493 (1991), *appeal dismissed sub nom. WATH, Inc. v. FCC*, D.C. Cir. No. 91-1268 (September 26, 1991). They argued that Radio Triangle's proposal should either be denied, allotted with an alternate site restriction of at least 3.8 kilometers (2.4 miles) west of the proposed coordinates, or that Station WSAY-FM be required to operate with a directional antenna so as not to conflict with the pending applications of Station WCZI-FM and WBCG(FM).

3. In response, Radio Triangle noted that its petition for rule making was timely filed for consideration under the minimum distance separation requirements in effect prior to October 2, 1989, and therefore its proposal is fully spaced to Station WCZI-FM and WBCG(FM). Radio Triangle argued that if New East and Roanoke objected to the Commission's decision to permit the filing of petitions for rule making using the "old" minimum distance separation requirements prior to October 2, 1989, they should have sought reconsideration of the *Six Kilowatt Order*. As for the claims of economic harm, Radio Triangle argued that the Commission does not consider such allegations at the rule making stage. In response to the claims that its proposal and the two applications should be comparatively considered, Radio Triangle argued that the Rocky Mount upgrade should be favored since it represents a gain area 67% larger and encompasses twice as many persons as the aggregate totals for Station WCZI-FM and WBCG(FM). It argued that *Greenup* is distinguishable from the instant situation,

[1] *See Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A Stations ("Six Kilowatt Order")*, 4 FCC Rcd 6375 (1989), *recon. granted in part*, 6 FCC Rcd 3417 (1991).

[2] *See* File No. BPH-900817IC for Station WCZI-FM and File No. BPH-900817IB for Station WBCG(FM). The applications were filed after Radio Triangle filed its petition for rule making on September 29, 1989.

[3] The FM allotment priorities are (1) first full-time aural service; (2) second full-time aural service; (3) first local aural service; and (4) other public interest matters. Co-equal weight is given to priorities 2 and 3. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982).

as no first or second aural reception service is proposed. Finally, Radio Triangle opposed the suggestion that its transmitter site for Station WSAY-FM be relocated, as the station can be upgraded at its existing transmitter site. It claimed that the site area proposed by New East and Roanoke is less than one square mile, located in a flood plain, and located within three miles of an airport. Radio Triangle maintains that Station WCZI-FM and WBCG(FM) could be relocated in order to operate with six kilowatts power.

4. We granted Radio Triangle's proposal in the *Report and Order*. We found that Radio Triangle's request was properly accepted for consideration under the "old" minimum distance separation requirements in effect when the petition was filed. As such, the proposal would be fully spaced to Stations WCZI-FM and WBCG(FM) as three kilowatt stations. We stated that New East and Roanoke should have raised their concerns about the implementation of the *Six Kilowatt Order* in conjunction with a petition for reconsideration of that proceeding. We also found that the claims of economic harm raised by New East and Roanoke were not relevant, as the Commission has abolished consideration of such issues in allotment proceedings.

5. We comparatively considered New East and Roanoke's applications for six kilowatt operation and Radio Triangle's proposal, and determined that the provision of additional reception service to 21,584 persons, including a third, fourth and fifth full-time reception service to a total of 3,673 persons does not present sufficiently compelling public interest benefits to outweigh the public interest benefit accruing from the provision of a new reception service to a total of 45,931 persons from the Rocky Mount upgrade. Finally, we stated that the public interest benefits from granting the pending applications of Stations WCZI-FM and WBCG(FM) are not sufficiently compelling to overcome the Commission's policy of not forcing an existing station to relocate its transmitter in order to accommodate a proposal elsewhere, and we declined to require Station WSAY-FM to relocate its transmitter site or to operate with a directional antenna.

6. *Petition for reconsideration.* New East and Roanoke argue that Radio Triangle's petition for rule making should not be eligible for consideration under the "old" minimum distance separation requirements. They claim that although the *Six Kilowatt Order* permitted petitioners to file rule making petitions under the old minimum distance separation requirements until October 2, 1989, but prohibited the filing of applications to increase power to six kilowatts until after October 2, 1989, the action had the "perverse and arbitrary effect of disadvantaging the very stations the new rules were supposedly designed to assist in obtaining the additional power." They argue that the statement in the *Report and Order* that New East and Roanoke should have sought reconsideration of the *Six Kilowatt Order* is not a sufficient answer, as New East did not acquire Station WCZI-FM until September 5, 1989, after the *Six Kilowatt Order* was adopted. They allege that the staff cannot base a decision in this case merely on filing deadlines, but must also engage in "a specific analysis of the benefits which would accrue from a grant of either of the proposals."

7. New East and Roanoke also argue that the public interest would be better served by grant of the applications seeking six kilowatt power increases for Stations WCZI-FM and WBCG(FM) than by grant of Radio Triangle's proposal. First, they claim that grant of the applications would allow all three stations to operate as six kilowatt Class A stations, which they claim is consistent with the goals of the *Six Kilowatt Order*. Adoption of the Rocky Mount upgrade, on the other hand, would result in one Class C3 station and two "second class" three kilowatt Class A stations. Second, New East and Roanoke claim that by increasing the power of their stations to six kilowatts, they will be able to provide additional reception service to underserved areas in rural eastern North Carolina. On the other hand, they argue, grant of the Rocky Mount upgrade will result in provision of additional reception service to well-served areas of the state. They point out that grant of the applications would permit Station WBCG(FM) to provide a third full-time aural reception service to 309 persons, a fourth full-time aural reception service to 1,699 persons, and a fifth full-time aural reception service to 2,462 persons, and the aggregate additional population served by Stations WCZI-FM and WBCG(FM) would increase by 21,584 persons. They argue that provision of a new third, fourth and fifth aural reception service should be the key to our public interest analysis, but the *Report and Order* favored a proposal which would instead provide additional service to an area which is already well-served. Finally, they argue that the *Report and Order* neglected to consider the *Greenup Memorandum Opinion and Order*, 6 FCC Rcd 1493 (1991). They claim that this decision stands for the proposition that a proposal which would serve a smaller total area and population but which would also serve a population generally receiving fewer aural services may be preferred from a public interest standpoint. Therefore, New East and Roanoke request that the Rocky Mount upgrade be denied, or that Station WSAY-FM be required to operate with a site restriction or with a directional antenna to permit Stations WCZI-FM and WBCG(FM), to operate as six kilowatt facilities.

8. Radio Triangle objects to the petition for reconsideration, arguing that the *Report and Order* addressed and rejected all but one of the assertions raised by New East and Roanoke. First, Radio Triangle argues that the *Report and Order* properly characterized New East and Roanoke's concerns about the implementation of the *Six Kilowatt Order* as misplaced in this proceeding, agreeing that the proper avenue for relief was the filing of a petition for reconsideration of that proceeding.[4] Radio Triangle maintains that the decision in the *Report and Order* was fully consistent with the *Six Kilowatt Order*. Second, Radio Triangle argues that the *Report and Order* properly determined that New East and Roanoke's minor change applications did not constitute "counterproposals" in this proceeding. Third, Radio Triangle maintains that the *Report and Order* properly compared the public interest benefits of the competing proposals in determining that the provision of third, fourth and fifth full-time aural reception services that would result from the grant of six kilowatt operation for Stations WCZI-FM and WBCG(FM) did not outweigh the

[4] As for New East's allegation that it could not have sought reconsideration of the *Six Kilowatt Order* since it did not own Station WCZI-FM until September 5, 1989, Radio Triangle notes that the deadline for petitions for reconsideration did not fall until two weeks after that date. It also argues that Roanoke could have sought reconsideration of the *Six Kilowatt Order*, and that Roanoke offers no explanation as to why it did not do so.

provision of an additional aural reception service to over 45,000 persons that would result from grant of the Rocky Mount upgrade. Radio Triangle claims that the decision is fully consistent with *Greenup*, arguing that *Greenup* stands for the proposition that the Commission will generally prefer a proposal that results in the provision of additional reception service to the greatest number of people. Although New East and Roanoke argue that the *Report and Order* should have compared the "service value indices" of their proposals to the "service value index" of the Rocky Mount proposal, Radio Triangle maintains that the Commission stated in *Greenup* that a petitioner that seeks to rebut the presumption favoring the proposal that would provide additional reception service to the greater number of people must make a showing that discounts the raw population totals in proportion to the number of services available in the proposed service areas. Radio Triangle points out that New East and Roanoke have not made such a showing. Finally, Radio Triangle argues that the *Report and Order* correctly stated that New East and Roanoke failed to show that Station WSAY-FM should be forced to relocate its transmitter or operate with a directional antenna in order to accommodate the Washington and Murfreesboro six kilowatt power increase requests. It maintains that there are "very large areas available" in which to relocate the antennas of Stations WCZI-FM and WBCG(FM) to accommodate six kilowatt operation.

9. In reply, New East and Roanoke maintain that the Commission's staff has conducted a *Greenup* -type analysis on its own motion, citing *Report and Order (Willmar, Princeton and Olivia, Minnesota)* (*"Willmar"*), 6 FCC Rcd 3361 (1991), and the failure to do so in this case is in error. They also maintain that they cannot afford to relocate the antennas of Stations WCZI-FM and WBCG(FM) to accommodate six kilowatt operation.

10. *Discussion.* We will deny New East and Roanoke's petition for reconsideration. The petition for reconsideration largely reargues allegations raised in comments to the *Notice of Proposed Rule Making.*

11. As we stated in the *Report and Order*, New East and Roanoke's contentions regarding the treatment of Radio Triangle's petition for rule making under the "old" minimum distance separation requirements is misplaced. The *Six Kilowatt Order* clearly states that applications and petitions filed prior to October 2, 1989, will be treated under the "old" minimum distance separation requirements. *See Six Kilowatt Order*, 4 FCC Rcd at 6382. Any objection that New East and Roanoke had with respect to the implementation of the *Six Kilowatt Order* should have been filed in connection with a petition for reconsideration of that proceeding. We agree with Radio Triangle that New East offers insufficient justification regarding its failure to file a timely petition for reconsideration of the *Six Kilowatt Order*. New East acquired Station WXZI-FM after the *Six Kilowatt Order* was adopted, but before the period for filing reconsiderations expired. Therefore, New East could have filed a petition for reconsideration. Furthermore, Roanoke offers no explanation as to why it did not file for reconsideration.

12. We performed a comparative analysis of the public interest benefits of Radio Triangle's channel upgrade request and the six kilowatt applications in the *Report and Order*. That analysis determined that the public interest would be better served by the grant of Radio Triangle's proposal on the grounds that the Rocky Mount channel upgrade would provide additional aural reception service to a total of 45,931 persons, including a fourth full-time aural reception service to 797 persons. While we noted that grant of the Washington and Murfreesboro six kilowatt applications would provide an additional aural reception service to 21,584 persons, including a third full-time aural reception service to 309 persons, a fourth full-time aural reception service to 1,699 persons and a fifth full-time aural reception service to 2,462 persons, we found that grant of the applications did not present sufficiently compelling public interest benefits to outweigh the public interest benefits accruing from the provision of a new service to over twice as many persons. This analysis fully accounted for the fact that the Washington and Murfreesboro stations would provide additional reception service to certain underserved areas. New East and Roanoke present no evidence that our weighing of the public interest benefits of the competing proposals was incorrect.

13. Our analysis was fully consistent with the Commission's dictates in *Greenup*. That case states that, when comparing upgrade proposals under allotment priority four, other public interest matters, we will first consider simple net differences in the number of persons newly served by each proposal. A petitioner may then make a showing that discounts the population totals in proportion to the number of services available in the proposed service areas, using the methods outlined in *Greenup* to compute a "service value index". *See Greenup*, 6 FCC Rcd at 1495. In this proceeding, New East and Roanoke did not provide a service value index analysis, and therefore our decision was based on the raw population totals.[5]

14. As a final matter, we will not require Station WSAY-FM to operate at an alternate site or to use a directional antenna so as to accommodate New East and Roanoke's six kilowatt applications. Radio Triangle has stated that it is unwilling to move from its existing transmitter site or to operate with a directional antenna, and that the alternate site area located by New East and Roanoke is unusable. New East and Roanoke have offered no evidence rebutting Radio Triangle's claim that alternate sites are not available. In any event, we will not require an existing licensee or permittee to change its authorized transmitter site to accommodate a proposal or application without the consent of the licensee or permittee. *See, e.g., Claremore, Oklahoma*, 3 FCC Rcd 4037 (1988).

15. In view of the above, IT IS ORDERED, That the petition for reconsideration filed by New East Communications, Inc., and Roanoke Chowan Broadcasting Corporation IS HEREBY DENIED.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

[5] The Commission anticipated that the petitioner, and not the Commission's staff, would be responsible for providing a *Greenup* service value index analysis. *See Greenup*, 6 FCC Rcd at 1495. Although East and Roanoke claim that the Commission's staff has conducted a service value index analysis on its own motion, citing *Willmar*, we note that *Willmar* did not involve a service value index analysis. Rather, *Willmar* involved a comparison of the populations within the reception service gain areas of competing proposals, and the analysis was similar to the analysis conducted in the *Report and Order* in this case.

17. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Local Area Telecommunications, Inc. — Transmittal No. 1

Tariff F.C.C. No. 1

ORDER

Adopted: August 12, 1993; Released: August 16, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 26, 1993, Local Area Telecommunications, Inc. (Locate), filed the above-captioned transmittal with an effective date of March 27, 1993. After the transmittal became effective, Bell Atlantic filed a petition on April 2, 1993, to reject the Locate transmittal and an alternative motion for an order to require Locate to show cause why its tariff should not be cancelled. On that same date, the New York Telephone Company and the New England Telephone and Telegraph Company (NYNEX) jointly filed a similar petition for rejection and alternative motion for an order to show cause. Locate filed an opposition to these motions and petitions on April 9, 1993.

2. In its petition against the above transmittal,[1] Bell Atlantic contends that the Commission has the authority to reject a tariff that has already become effective. Bell Atlantic Petitions at 1 n.2 (*citing Interstate Commerce Commission v. American Trucking Ass'ns*, 467 U.S. 354 (1984). (*ICC v. ATA*). However, in its opposition to the Bell Atlantic petition, Locate claims the Commission lacks authority to reject an effective tariff and that the Commission has not followed the case cited by Bell Atlantic to support such authority. Locate Opposition at 1-2.

3. In the alternative, Bell Atlantic and NYNEX requests that the Commission order Locate to show cause why its tariff should not be cancelled and why it should not cease providing interstate common carrier services until it has a lawful tariff in effect. Bell Atlantic Petition at 1, 5 and NYNEX Petition at 1, 7.

4. Earlier this year, the Common Carrier Bureau (Bureau) considered similar petitions and alternate motions for orders to show cause filed in opposition to the initial tariffs of five other previously forborne carriers.[2] In its *May Order*, the Bureau denied those petitions and the related motions for orders to show cause; the Bureau also dismissed as moot certain motions to accept late-filed pleadings.[3] The pending petition and motions filed in opposition to the above-captioned transmittal do not include any new issues that were not addressed in the *May Order*. We, therefore, deny the Bell Atlantic and NYNEX petitions and related alternative show cause motions for the same reasons cited by the Bureau in its *May Order*.

5. Accordingly, IT IS ORDERED that the petitions to reject Local Area Telecommunications, Inc., Transmittal No. 1, filed by the Bell Atlantic Telephone Companies and jointly by the New York Telephone Company and the New England Telephone and Telegraph Company, ARE DENIED.

6. IT IS FURTHER ORDERED that the alternative motion for an order to show cause, filed jointly by the New York Telephone Company and the New England Telephone and Telegraph Company with reference to Local Area Telecommunications, Inc., Transmittal No. 1, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Bell Atlantic claims that, on its face, this tariff violates various provisions of the Communications Act and Commission orders. On that basis, Bell Atlantic urges that it be rejected. Similarly, NYNEX claims the Locate tariff violates various provisions of the Act and should therefore be rejected. NYNEX Petition at 3-6.

[2] Those other five previously forborne carriers are: Teleport Communications Group Operating Companies, Bay Area Teleport, MFS Telecom, Inc., Eastern Telelogic Corp., and M H Lightnet Inc.

[3] Teleport Communications Group Operating Companies Transmittal No. 1, Order, 8 FCC Rcd 3611 (Com. Car. Bur.) (*May Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 18, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NYNEX'S PETITION FOR WAIVER OF PART 69 OF THE COMMISSION'S RULES FOR THE VERMONT MARKET PLAN

On August 13, 1993, New York Telephone Company and New England Telephone and Telegraph Company (NYNEX) filed a petition requesting a waiver of Part 69 of the Commission's rules to offer discounts on switched access services to customers with certain levels of traffic growth. NYNEX seeks to offer this plan in the state of Vermont for a three-year trial period. NYNEX states that the data from the Vermont Market Plan "market trial" will be used to determine whether this type of pricing plan will be effective in other market areas.

Interested parties are to file comments on this petition by **September 8, 1993**, and reply comments by **September 23, 1993**, with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Commission Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-264

In the Matter of

Implementation of Sections 11
and 13 of the Cable Television
Consumer Protection and
Competition Act of 1992

Horizontal and Vertical Ownership
Limits, Cross-Ownership Limitations
and Anti-Trafficking Provisions

ERRATUM

Released: August 17, 1993

On July 23, 1993, the Commission released the *Report and Order and Further Notice of Proposed Rule Making* in MM Docket No. 92-264, FCC 93-332 (*"Report and Order"*), which interpreted and implemented the anti-trafficking and cross-ownership provisions of the Cable Television Consumer Protection and Competition Act of 1992, and requested further comment on the adoption of vertical and horizontal ownership limits. The Petition for Clarification or Reconsideration filed by Oklahoma Western Telephone Company and the Petition for Partial Reconsideration and Emergency Motion for Partial Stay filed by the Wireless Cable Association have brought to our attention an inadvertent misstatement regarding the grandfathering of certain cable/MMDS and cable/SMATV cross-ownership interests.

Accordingly, we make the following changes to the above-captioned *Report and Order*. The second, third and fourth sentences of paragraph 93 are replaced as follows:

93. Section 613 also directs the Commission to waive all cable/MMDS and cable/SMATV cross-ownership interests existing as of October 5, 1992, the date of enactment of the 1992 Cable Act. Accordingly, the Commission will waive all cable/MMDS and cable/SMATV cross-ownership interests existing as of that date.

Appendix D -- Rule Changes, is also revised by adding 47 C.F.R. § 21.912, paragraphs (e)(1) and (2) to read as follows:

(e)(1) Applications filed by cable operators, or affiliates, for MMDS channels prior to February 8, 1990, will not be subject to the prohibitions of this section. Except as provided in paragraph (e)(ii) below, applications filed on February 8, 1990, or thereafter will be returned. Lease arrangements between cable and MDS entities for which a lease or a firm agreement was signed prior to February 8, 1990, will also not be subject to the prohibitions of this section. Except as provided in paragraph (e)(2) below leases between cable operators, or affiliates, and MDS/MMDS station licensees, conditional licensees, or applicants executed on or before February 8, 1990, or thereafter are invalid.

(e)(2) Applications filed by cable operators, or affiliates for MDS channels after February 8, 1990, and prior to October 5, 1992, will not be subject to the prohibition of this section, if, pursuant to the then existing overbuild or rural exceptions, the applications were allowed under the then existing cable/MMDs cross-ownership prohibitions. Lease arrangements between cable operators and MDS entities for which a lease or firm agreement was signed after February 8, 1990, and prior to October 5, 1992, will not be subject to the prohibitions of this section, if, pursuant to the then existing rural and overbuild exceptions, the lease arrangements were allowed.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

PORTLAND CELLULAR PARTNERSHIP — File No. 27414-CL-P-152-B-86

For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, in Market 152, Portland, Maine

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P. — File No. 27488-CL-P-152-B-86

For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, in Market 152, Portland, Maine

ORDER

Adopted: August 18, 1993; Released: August 19, 1993

By the Acting Chief, Common Carrier Bureau:

INTRODUCTION

1. In this order, we address a motion for stay filed June 25, 1993 by Portland Cellular Partnership (Port Cell). In its motion, Port Cell requests that the Commission stay its June 4, 1993 Memorandum Opinion and Order (FCC 93-296) in *Portland Cellular Partnership* (File No. 27414-CL-P-152-B-86) and *Northeast Cellular Telephone Company, L.P.* (File No. 27488-CL-P-152-B-86) (hereinafter *Reconsideration Order)* pending a Commission decision on the petition for further reconsideration that was filed by Port Cell contemporaneously with its motion. If the petition is not granted, Port Cell requests that the Commission stay the effectiveness of the *Reconsideration Order* pending a decision on appeal to the United States Court of Appeals for the District of Columbia Circuit. An opposition to the motion was filed by Northeast Cellular Telephone Company (Northeast).[1] For the reasons discussed below, we deny Port Cell's motion for stay.

DISCUSSION

2. Port Cell contends that staying the effectiveness of the *Reconsideration Order* is warranted and also argues that it has made the required demonstrations that: (1) it would be irreparably harmed if its motion is not granted; (2) it is likely to prevail on the merits of its appeal; (3) a stay would cause little, if any harm to other interested parties; and (4) a stay would serve the public interest.[2] We disagree. The Commission is required to stay an action only in those cases where the movant convincingly demonstrates that all four elements set forth in *Virginia Petroleum* and its progeny have been met. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Port Cell has not met this burden, particularly regarding irreparable injury, which is the gravamen of its motion.

3. Port Cell maintains that unless the Commission stays the *Reconsideration Order*, Port Cell's business will be destroyed. Under the *Reconsideration Order*, Port Cell notes that it will be required to terminate cellular service in the Portland NECMA ten days after it receives notice from Northeast that Northeast is ready to commence service. Port Cell argues that it will lose any remaining customers still using its system and, in the interim, it is likely to lose customers due to the confusion caused by the *Reconsideration Order* and its competitors' efforts to convince Port Cell customers to switch to their systems. According to Port Cell, these concerns are not speculative as evidenced by numerous inquiries from its customers following a newspaper article stating Port Cell had been "stripped" of its license by the FCC. Thus, Port Cell argues that the harm it will suffer without the stay is "certain and great. . . actual and not theoretical," *see Wisconsin Gas Co. v. FERC*, *supra*, and is "of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Id.*, citing *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 307 (D.D.C.) *aff'd*, 548 F.2d 977 (D.C. Cir. 1976).[3]

4. In addition, Port Cell contends that the Commission has a long-standing policy that decisions terminating the authority of a licensee currently in operation and providing service to the public should not become effective until after the conclusion of judicial review.[4] Port Cell claims that there have been cases in which the Commission has

[1] Through an apparent miscalculation, Northeast filed its opposition pleading two days late. In its motion for leave to file the opposition, Northeast argues that the Commission can waive this procedural rule (*see* 47 C.F.R. § 1.45) and should do so here, where no prejudice would result and the public interest would be served, citing *Noble Syndications, Inc.*, 46 Rad. Regs. (P&F) 2d 511 (1979). We grant Northeast's motion in order to have a complete record.

[2] *See Washington Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) and *Virginia Petroleum Jobbers Association v. FPC*, 295 F.2d 921 (D.C. Cir. 1958).

[3] Port Cell also argues that the Commission abused its discretion by not considering the merits of the Paperwork Reduction Act issue raised in Port Cell's petition for reinstatement, and that it is likely to prevail on appeal to the United States Court of Appeals.

[4] In support of this contention, Port Cell cites the following cases: *West Coast Media, Inc.*, 79 FCC 2d 610 (1980), *recon. denied*, 49 Rad. Regs. (P&F) 2d 623 (1981), *aff'd sub nom. West Coast Media, Inc. v. FCC*, 695 F.2d 617 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 816 (1983); *RKO General , Inc.*, 78 FCC 2d 1, 120 (1980), *aff'd sub nom. RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *Pass Word, Inc.*, 76 FCC 2d 465 (1980), *recon. denied*, 49 Rad. Regs. 2d 1013 (1981), *aff'd sub nom. Pass Word, Inc. v. FCC*, 673 F.2d 1363 (D.C. Cir. 1982), *cert. denied*, 459 F.2d 840 (1982); *Radio Carrollton*, 52 FCC 2d 1173 (1975), *vacated and remanded sub nom. Faulkner Radio, Inc. v. FCC*, 557 F.2d 866 (D.C. Cir. 1977);

even extended the interim operating authority after judicial review was completed, permitting the licensee to continue operating even after the licensee's lack of qualifications had been finally adjudicated.[5] According to Port Cell, the cited cases involved serious violations affecting the licensee's qualifications, whereas here, it has not been found unqualified to hold a license, but has only failed to supply a financial showing meeting the requirements of Commission rules. Under the circumstances, and considering the Commission's past policy with respect to terminating licensing authority, Port Cell argues that it should not be denied the opportunity to continue operating while it attempts to seek vindication in the courts.

5. Port Cell has failed to make a sufficient showing to justify the extraordinary relief it seeks. It has not shown that it will suffer irreparable injury if the *Reconsideration Order* is not stayed. It is well settled that economic loss does not, in and of itself, constitute irreparable harm. *See Wisconsin Gas Co. v. FERC, supra.* The Commission granted Port Cell interim operating authority on April 30, 1991 pending authorization of a new licensee. In that order, it vacated the Port Cell grant and dismissed its application pursuant to an order by the United States Court of Appeals for the District for Columbia Circuit (Court). *Portland Cellular Partnership,* 6 FCC Rcd 2283 (1991) (*Remand Order).* The Court found that the Commission's decision to waive the financial requirements was not consistent with *WAIT Radio v. FCC,* 418 F. 2d 1153 (D.C. Cir. 1969). *Northeast Cellular Telephone Company, L.P. v. FCC,* 897 F.2d 1164 (D.C. Cir. 1990). On reconsideration of the *Remand Order,* the Commission modified that order to terminate Port Cell's interim operating authority when Northeast, the new licensee, is ready to begin providing service. There is no reason further to delay termination of Port Cell's interim operating authority. According to Northeast, it is prepared to begin negotiations for the purchase of Port Cell's existing cellular system and customer base. An agreement between the parties would ensure continuity of operations and mitigate any economic harm to Port Cell. In the unlikely event that, despite the court decision, Port Cell is ultimately successful, it will be able to begin offering service again. Thus, Port Cell has failed to demonstrate that it would suffer irreparable harm as required for grant of a stay. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., supra.* The cases cited by Port Cell in support of its motion for stay do not involve similarly situated entities. None of those cases involved grant of a stay to an interim operator whose non-final license grant was rescinded by the Commission pursuant to a court order. Port Cell cites no authority supporting continuing its interim operating authority after a new licensee has been selected in such a situation.

6. Port Cell has also failed to meet the other standards for a stay. In particular, Port Cell has not demonstrated that delaying implementation of the *Reconsideration Order* pending the outcome of Port Cell's petition for further reconsideration and court review, which may not be resolved for some time, would be in the public interest.

7. In sum, we find that Port Cell has not demonstrated that staying the effectiveness of the *Reconsideration Order* is warranted.

8. Accordingly, IT IS ORDERED THAT, the "Motion for Stay" filed by Portland Cellular Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

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on remand, Radio Carrollton, 69 FCC 2d 1139, 1156 (1978), *recon. denied,* 72 FCC 2d 264 (1979), *aff'd mem. sub nom. Faulkner Radio, Inc. v. FCC,* No. 79-1749 (D.C. Cir. Oct. 15, 1980), *cert. denied,* 450 U.S. 1041 (1981); *Star Stations of Indiana, Inc.,* 51 FCC 2d 95, 109 *aff'd mem. sub nom. Star Broadcasting, Inc. v. FCC,* 527 F.2d 853 (D.C. Cir. 1975), *cert. denied,* 425 U.S. 992 (1976).

[5] *E.g., RKO General, Inc.,* 89 FCC 2d 361 (1982); *Pass Word, Inc.,* 52 Rad. Regs. (P&F) 2d 770 (1982); *Faulkner Radio, Inc.,* 49 Rad. Regs. 2d 1599 (1981).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Standards for Assessing
Forfeitures

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

POLICY STATEMENT

Adopted: August 3, 1993; Released: August 12, 1993

By the Commission: Commissioner Barrett concurring in the result.

1. In this *Policy Statement*, we make certain adjustments to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992)(*1991 Policy Statement*).

2. The Commission released the *1991 Policy Statement* to establish general, non-binding guidance that may be used in assessing forfeitures. The Commission retained discretion in specific cases to deviate from the *1991 Policy Statement*. The Commission has been operating under the *1991 Policy Statement* guidelines since August, 1991. During that time, we have been able to review how it is functioning in practice. In light of that experience, we believe it is appropriate to make various modifications. Our most significant changes seek to ensure that the most significant penalties are applied to violations that implicate health or safety concerns; seek to ensure that forfeiture amounts are consistent for similar types of offenses; add certain violation categories; reiterate in the Appendix our and the staff's discretion not to follow the *Policy Statement* in specific cases, including by not issuing a forfeiture at all in appropriate cases; clarify that the upward adjustment factor for repeated or continuous violations is not necessarily applied on a per violation or per day basis; state that issuing a citation prior to a forfeiture is not required for tower owners who have received notice of their regulatory obligations; find that financial hardship may be presumed to exist in certain cases involving individuals; and reflect a change in the statutory amount applied to cable equal employment opportunity (EEO) violations. The modifications are set forth in the Appendix, which supersedes prior versions of the Appendix.[1]

3. Accordingly, IT IS ORDERED that this *Policy Statement* is ADOPTED, to be effective upon adoption.

4. The notice and comment and effective date provisions of the Administrative Procedure Act do not apply to this *Policy Statement*. 5 U.S.C. Section 553(b)(A), (d)(2).

[1] The Commission has deleted the broadcast EEO rules violation category and will issue a *Further Policy Statement* in this regard at a later date.

APPENDIX

STANDARDS FOR ASSESSING FCC FORFEITURES[1]

I. BASE AMOUNTS FOR SECTION 503 FORFEITURES

VIOLATION	% of Stat. Max.	BC/CABLE ($25,000)	CC ($100,000)	OTHER ($10,000)
Misrepresentative/lack of candor	80%	20,000	80,000	8,000
Construction and/or operation without an instrument of authorization for the service	80%	20,000	80,000	8,000
Unauthorized substantial transfer of control	80%	20,000	80,000	8,000

[1] This Policy Statement provides guidance that the Commission and its staff may use in particular cases. The Commission and its staff retain the discretion to issue a higher or lower forfeiture than provided in the Policy Statement, no forfeiture at all or alternative or additional sanctions. The forfeiture ceilings per violation or per day of a continuing violation contained in section 503 of the Communications Act and the Commission's Rules are $100,000 for common carriers or applicants, $25,000 for broadcasters and cable operators or applicants, and $10,000 for all others. 47 U.S.C. Sec. 503(b)(2); 47 C.F.R. Sec. 1.80. In addition, for continuing violations involving a single act or failure to act, there is an overall limit of $1,000,000 for common carriers or applicants, $250,000 for broadcasters and cable operators or applicants, and $75,000 for all others. Id. The base amounts listed are for a single violation or single day of a continuing violation. While there is an upward adjustment factor for repeated or continuous violations, that upward adjustment is not necessarily applied on a per violation or per day basis. See Section II, infra. Unless Commission authorization is required for the behavior involved, a section 503 forfeiture proceeding against a non-licensee or non-applicant who is not a cable operator or is not operating in the radio control or citizens band radio service can only be initiated for a second violation, after issuance of a citation in connection with a first violation. 47 U.S.C. Sec. 503(b)(5). However, a citation is not required for non-licensee tower owners who have previously received notice of the obligations imposed by section 303(q) from the Commission or the permittee or licensee who uses that tower. Forfeitures issued under other sections of the Act are dealt with separately in Section III below.

VIOLATION	% of Stat. Max.	BC/CABLE ($25,000)	CC ($100,000)	OTHER ($10,000)
Violations of rules relating to distress & safety frequencies	80%	20,000	80,000	8,000
False distress communications	80%	20,000	80,000	8,000
Alien ownership violation	80%	20,000	80,000	8,000
Failure to permit inspection	75%	18,750	75,000	7,500
Violation of operator service requirements	75%	n.a.	75,000	7,500
Violation of pay-per-call requirements	75%	n.a.	75,000	7,500
Unauthorized conversion of long distance telephone service	75%	n.a.	75,000	n.a.
Malicious interference	70%	17,500	70,000	7,000
Importation or marketing of unauthorized equipment	70%	n.a.	70,000	7,000
Exceeding authorized antenna height	60%	15,000	60,000	6,000
Transmission of indecent/ obscene material	50%	12,500	n.a.	5,000
Violation of political rules: reasonable access, lowest unit charge, equal opportunities and discrimination	50%	12,500	n.a.	n.a.
Fraud by wire, radio or television	50%	12,500	50,000	5,000
Exceeding power limits	40%	10,000	40,000	4,000
No licensed operator on duty	40%	10,000	n.a.	4,000

VIOLATION	% of Stat. Max.	BC/CABLE ($25,000)	CC ($100,000)	OTHER ($10,000)
Failure to maintain directional pattern within prescribed parameters	40%	10,000	n.a.	n.a.
Failure to respond to Commission communications	40%	10,000	40,000	4,000
Unauthorized emissions	40%	10,000	40,000	4,000
Using unauthorized frequency	40%	10,000	40,000	4,000
EBS equipment not installed or operational	40%	10,000	n.a.	n.a.
Violation of children's television commercialization or programming requirements	40%	10,000	n.a.	n.a.
Violation of main studio rule	40%	10,000	n.a.	n.a.
Violation of broadcast hoax rule	40%	10,000	n.a.	n.a.
Failure to engage in required frequency coordination	40%	10,000	40,000	4,000
AM tower fencing	40%	10,000	n.a.	n.a.
Failure to comply with prescribed lighting & marking	varies	8,000	8,000	8,000
Violation of public file rules	20%	5,000	20,000	n.a.
Unauthorized discontinuance of service	20%	5,000	20,000	2,000
Use of unauthorized equipment	20%	5,000	20,000	2,000
Construction or operation at unauthorized location	20%	5,000	20,000	2,000

VIOLATION	% of Stat. Max	BC/CABLE ($25,000)	CC ($100,000)	OTHER ($10,000)
Violation of transmitter control and metering requirements	20%	5,000	20,000	2,000
Failure to file required forms or information	20%	5,000	20,000	2,000
Violation of sponsorship ID requirements	20%	5,000	n.a.	n.a
Violation of requirements pertaining to broadcasting of lotteries or contests	20%	5,000	n.a.	n.a
Broadcasting telephone conversations without authorization	20%	5,000	n.a.	n.a.
Failure to make required measurements or conduct required monitoring	10%	2,500	10,000	1,000
Violation of enhanced underwriting requirements	10%	2,500	n.a.	n.a.
Failure to provide station ID	5%	1,250	5,000	500
Unauthorized pro forma transfer of control	5%	1,250	5,000	500
Failure to maintain required records	5%	1,250	5,000	500
Miscellaneous minor violations	2.5%	625	2,500	250

II. ADJUSTMENT CRITERIA FOR SECTION 503 FORFEITURES[2]

Upward Adjustment Criteria

(1) Egregious misconduct	50-90%
(2) Ability to pay/relative disincentive[3]	50-90%
(3) Intentional violation	50-90%
(4) Substantial harm	40-70%
(5) Prior violations of same or other requirements	40-70%
(6) Substantial economic gain	20-50%
(7) Repeated or continuous violation	varies[4]

Downward Adjustment Criteria

(1) Minor violation[5]	50-90%
(2) Good faith or voluntary disclosure	30-90%
(3) History of overall compliance	20-50%
(4) Inability to pay	varies[6]

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[2] Both upward and downward adjustments are applied to the base forfeiture amount. More than one factor may apply in a given case. This list of factors is intended to include the most common situations that arise under section 503(b)(2)(D) and is not intended to limit the Commission's discretion under that section.

[3] The Commission is required by the Communications Act to take ability to pay into consideration in assessing forfeiture amounts. 47 U.S.C. Sec. 503(b)(2)(D).

[4] The percentage adjustment for this criterion could vary up to the statutory maximum per violation or per day of a continuing violation.

[5] A "minor" violation is misconduct which is at a low level of seriousness within the violation category. A minor violation is the opposite of "egregious misconduct."

[6] As noted above, the Commission is required by the Communications Act to take ability to pay into consideration in assessing forfeiture amounts. 47 U.S.C. Sec.

III. NON-SECTION 503 FORFEITURES

Violation		Statutory Amount[7]
Sec. 202(c)	Common carrier discrimination	$6,000 + $300/day
Sec. 203(e)	Common carrier tariffs	$6,000 + $300/day
Sec. 205(b)	Common carrier prescriptions	$12,000
Sec. 214(d)	Common carrier line extensions	$1,200/day
Sec. 219(b)	Common carrier reports	$1,200
Sec. 220(d)	Common carrier records & accounts	$6,000/day
Sec. 223	Dial-a-Porn	$50,000 maximum/day
Sec. 364/386	Ship radio	$5,000/day (owner) $1,000 (master)
Sec. 506	Great Lakes Agreement	$500/day (owner) $100 (master)
Sec. 634	Cable EEO	$500/day

Note: Non-section 503 forfeitures may be adjusted downward using the "Downward Adjustment Criteria" shown for section 503 forfeitures in Section II above.

503(b)(2)(D). The application of a downward adjustment for inability to pay is based upon a showing of substantial financial hardship. Inability to pay would generally be considered as a downward adjustment factor only upon a specific showing by the entity against whom forfeiture action is taken. However, in cases involving violations by individuals who are not in the business of providing radio services, eg., recreational licensees, financial hardship may be presumed to exist in appropriate cases prior to a specific showing.

[7] Unlike section 503, which establishes maximum forfeiture amounts, other sections of the Act, with one exception, state prescribed amounts of forfeitures for violations of the relevant section. These amounts are then subject to mitigation or remission under section 504 of the Act. The one exception is section 223 of the Act, which provides a maximum of $50,000 per day. For convenience, the Commission will treat the $50,000 set forth in section 223 as if it were a prescribed base amount, subject to downward adjustments.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Diamond Broadcasting of California, Inc.[1]
File Nos. BR - 900802UL
BRH - 900802VF

For Renewal of Licenses for
Stations KKIS/KKIS-FM
Pittsburgh/Walnut Creek, California

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: July 29, 1993; Released: August 13, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications filed for the captioned stations; (ii) a Petition to Deny timely filed on November 1, 1990, by the California State Conference of Branches of the NAACP, various local NAACP branches (collectively "NAACP"), the National Black Media Coalition, the Bay Area Black Media Coalition and the Los Angeles Black Media Coalition (collectively "NBMC") against the renewal of these broadcast stations;[2] (iii) an opposition from the licensee; and (iv) the licensee's responses to staff letters of inquiry.

II. BACKGROUND

2. NAACP/NBMC allege that the challenged stations violated our Equal Employment Opportunity (EEO) Rule and policies. Accordingly, both organizations request that we conduct an investigation of the stations' employment practices pursuant to *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*), designate the renewal applications for hearing and, thereafter, deny the applications. The licensee charges that NAACP/NBMC have presented no evidence of discrimination, that the records indicate compliance with the Commission's EEO Rule, and that unconditional renewal is warranted.

III. PLEADINGS

3. *STANDING.* KKIS/KKIS-FM argues that neither NAACP nor NBMC has standing to file a petition to deny its renewal applications. The licensee states that the declarations of Pluria Marshall, Chairman, NBMC and Jose DeSosa, President of the California State Conference of the NAACP fail to assert listenership and, thus, the petitions should be treated as informal objections. Further, it challenges the declaration of Rudolph Marshall, Chairman of the Bay Area Black Media Coalition on two grounds. It argues that his declaration "ostensibly relates to seven different stations ....," without identifying which station in particular he is referring to and that the statement was filed late. It concludes that even if the Commission overlooks the "facial ambiguity" the declaration should not be accepted.

4. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit, "specific allegations of fact sufficient to show ... that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline); Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

5. Filed with the petition to deny were unsigned declarations under penalty of perjury from Pluria Marshall, Chairman of the National Black Media Coalition and Rudolph Marshall, Chairman of the Bay Area Black Media Coalition. Mr. Pluria Marshall, a resident of the Washington, D.C. area, does not claim to be a listener of the challenged stations or a resident of the service area. Thus, his declaration does not satisfy the standing requirements of the Act. Although Mr. Rudolph Marshall states that he listens to KKIS/KKIS-FM, his declaration was submitted after the expiration of the deadline for petitions to deny without sufficient justification for its late filing. Therefore, we hold that NBMC lacks standing to petition KKIS/KKIS-FM's renewal applications and we will treat its pleading as an informal objection in accordance with 47 C.F.R. 73.3587. *See Michigan/Ohio Broadcast Renewals*, 3 FCC Rcd 6944 (1988); *see also KDEN Broadcasting Company*, 55 Rad. Reg. 2d (P&F) 1311, 1311-12 (1984).

6. Submitted with the NAACP petition is a statement under penalty of perjury from Jose DeSosa, the president of the California State Conference of the NAACP. However, Mr. DeSosa does not state that he is either a listener of the challenged stations or a resident of the service area. The Commission has previously held that without such assertions, the declaration does not satisfy the standing requirements of the Act. Accordingly, we hold that NAACP lacks standing to petition the referenced stations

[1] We note that the call sign for the AM station was changed on August 17, 1990 from KIXA(AM) to KKIS(AM). In this *Order* we will refer to the station by the new call letters. On December 30, 1988, Diamond Broadcasting of California, Inc. assumed the licenses for KKIS/KKIS-FM from Chabin Communications Corporation (File Nos. BAL - 880804EC, BALH - 880804ED). We note also on October 27, 1992, the Commission granted the involuntary assignment applications from Diamond Broadcasting of California, Inc. to Randolph E. George, Receiver (File Nos. BAL -920605EA, BALH - 920605EB). Randolph E. George has a pending application (BAL - 930127EA) to sell KKIS(AM) to Peoples Radio, Inc. The license term under review ended December 1, 1990.

[2] The Petition to Deny also included challenges against other radio stations in California which will be addressed in a separate Commission order.

and, thus, we will treat its pleading as an informal objection pursuant to 47 C.F.R. 73.3587. *See Michigan/Ohio, supra; see also KDEN, supra.*

IV. DISCUSSION

7. *PRIMA FACIE CASE.* NAACP/NBMC derived their factual allegations from the licensee's EEO programs and annual employment reports. Review of the licensee's EEO records led us initially to conclude that NAACP/NBMC presented a *prima facie* case against the stations demonstrating that unconditional grant of the renewal applications would have been inconsistent with the public interest. Section 309 (d)(1) of the Communications Act of 1934, 47 U.S.C. Section 309 (d)(1). *Astroline, supra.*[3] Further inquiry was therefore necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC,* 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont); Bilingual.* Review of NAACP/NBMC's EEO allegations, as well as the licensee's opposition and inquiry responses, now leads us to conclude that there are no substantial and material questions of fact warranting designation for hearing.

8. Section 73.2080 of the Commission's Rules, 47 C.F.R. 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080(b) and 73.2080(c).

9. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services,* 2 FCC Rcd 3967 (1987)(*Broadcast EEO), petition for recon. pending; see also* 4 FCC Rcd 1715 (1989)(request for clarification by the National Association of Broadcasters). *See e.g., Beaumont, supra; Bilingual, supra.*

10. Review of the licensee's renewal applications, opposition and inquiry responses reveals that the stations filled 17 full-time, including 14 upper-level, job vacancies during the renewal year period of June 1, 1989, through June 1, 1990. KKIS/KKIS-FM indicates that its EEO program contacts attracted minority referrals from the *Contra Costa Times* (six), *Radio & Records* (one), the Bay Area Broadcast Skills Bank (four), and an "in-house referral" (one).[4] The licensee further states that from June 1989 to June 1990, it mailed copies of job announcements to one female recruitment source, five-employment related organizations, six educational institutions, nine minority referral groups, and 14 personnel agencies, but reports no minority referrals from these contacts.[5] The stations do not explain whether all of the listed sources were regularly contacted for each job vacancy, but states that its efforts were "systematic." It explains that because its employment records were "inadvertently discarded," it could not reconstruct the data on applicant flow or interviewees during its tenure. However, KKIS/KKIS-FM indicates the following referral sources for its 17 full-time hires: *Contra Costa Times* (three), walk-in applicants (three), *Broadcasting Magazine* (two), in-house referrals (two, including one minority), Bay Area Broadcast Skills Bank (two), in-station referrals (two), Career Development Center (one), Contra Costa Community College (one), and an advertising agency (one). Among the 17 full-time, and 14 upper-level, interviewees and hires, the stations reported that one Hispanic was interviewed and hired for an upper-level position.[6]

11. NAACP/NBMC criticize the licensee for discontinuing its employment contacts with San Francisco and Oakland referral groups in favor of county sources, stating that the city-based sources are most likely to reach the greatest number of qualified minority applicants because of the labor force "... which is nearly 30% minority." NAACP/NBMC argue that KKIS/KKIS-FM's rationale for this action, its lower pay and the commuting distance from Oakland and San Francisco to its stations, does not justify this recruitment approach. NAACP/NBMC conclude that even though the Contra Costa County sources have not referred any minorities, KKIS/KKIS-FM does not propose to alter its employment outreach efforts.

12. The stations explain that their shift to predominately county organizations is consistent with Commission policy which favors deletion of non-productive recruitment sources. The licensee argues that redirecting its recruitment

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[3] The licensee was not challenged regarding its efforts directed toward women. Nonetheless, as is our practice in all cases, we reviewed the stations' EEO efforts toward women and found them sufficient.

[4] Our review of the licensee's records indicates one minority referral from an "in-house" source for a full-time position and one minority referral from the Bay Area Broadcast Skills Bank for a part-time position.

[5] In its renewal applications, KKIS/KKIS-FM states that because its Oakland and San Francisco recruitment sources were unproductive, it discontinued use of those organizations and began contacting referral groups in its county, Contra Costa. The stations add that its lower salaries and commuting distance from San Francisco and Oakland discourage minority applicants from these areas.

[6] The Hispanic employee was hired on July 24, 1989, but apparently did not remain at the stations throughout the filing period for the 1990 Annual Employment Report. KKIS/KKIS-FM is located in the Oakland Metropolitan Statistical Area (MSA) with a labor force including 43.6% females and 29.2% minorities (12.5% Blacks, 9.5% Hispanic, 6.6% Asian-Pacific Islander, and .6% American Indian). The stations' 1989 Annual Employment Report included a full-time staff of 17 employees, including one Black (6%), one Hispanic (6%), and one Asian-Pacific Islander (6%). Among the upper-level staff of 16 employees was one Hispanic (6%) and one Asian-Pacific Islander (6%). In 1990, the licensee reported no minorities on the full-time staff of 24 employees or the upper-level staff of 21 employees.

efforts to Contra Costa County will not reduce the number of minorities seeking employment at the stations even though the county's minority population is smaller than that of the Oakland Metropolitan Statistical Area (MSA). It reasons that county residents "expect lower wages" and have an easier commute, thus making station employment more attractive to minorities residing in the county than to minorities living in larger urban areas. KKIS/KKIS-FM acknowledges NAACP/NBMC's concern that the county referral sources have not yielded results, but states that it "will continue to try to improve ... recruitment efforts."

13. Our review of the record discloses no substantial and material questions of fact warranting designation for hearing. *See Astroline, supra.* We also find no evidence of discrimination. The licensee obtained some minority referrals, contacted minority sources and hired a minority during its tenure. Nonetheless, we find KKIS/KKIS-FM's efforts to recruit qualified minorities deficient because the record does not support that it recruited minorities for its 17 vacancies. For example, KKIS/KKIS-FM included a list of referral contacts but did not indicate how often sources were used, whether certain sources were used for particular jobs, or the results of those contacts. The stations submitted hire information for its renewal year, but did not provide applicant or interviewee flow data. Moreover, it is unclear what self-assessment the licensee conducted, if any, given the absence of records. Lastly, we note that the record indicates that the licensee hired one minority out of 17 vacancies for full-time positions.

14. As noted above, the licensee's recruitment efforts were deficient. We believe $12,500 is an appropriate base forfeiture for this violation of the broadcast EEO Rule. Moreover, this base amount will be adjusted upward here because the licensee's misconduct was egregious. Specifically, the licensee apparently failed to recruit minorities for a substantial number of vacancies. Additionally, KKIS/KKIS-FM neglected to adequately recruit or employ minorities despite the large pool of minorities (29.2%) in the labor force. We believe the combination of a failure to recruit for a substantial number of vacancies and the large pool of minorities in the labor force (12.5% Black, 9.5% Hispanic and 6.6% Asian) should result in an upward adjustment of $12,500 and a short term renewal for egregious violation of our EEO Rule. Based on the foregoing, we will grant renewal for a short term subject to reporting conditions and issue a Notice of Apparent Liability for $25,000.[7]

V. CONCLUSION

15. Upon review of the record, we find that grant of the renewal applications for KKIS/KKIS-FM is in the public interest. However, for violation of our EEO Rule, 47 C.F.R. 73.2080, by this *Order*, we will renew the licenses for a short term and issue a Notice of Apparent Liability for $25,000 against Diamond Broadcasting of California, Inc. Further, we will impose reporting conditions to ensure better record-keeping and encourage more meaningful self-assessment.

VI. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that the informal objections filed by the California State Conference of Branches of the NAACP, various local NAACP branches, the National Black Media Coalition, the Bay Area Black Media Coalition and the Los Angeles Black Media Coalition IS DENIED.

17. IT IS FURTHER ORDERED that the license renewal applications for Stations KKIS/KKIS-FM ARE GRANTED FOR A SHORT TERM ending December 1, 1995, subject to the reporting conditions specified herein, and pursuant to Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $25,000.

18. IT IS FURTHER ORDERED that the licensee of Stations KKIS/KKIS-FM submit to the Commission an original and one copy of the following information on August 1, 1994, August 1, 1995 and August 1, 1996:

(a) For each report, please make two lists divided by full-time and part-time job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and FCC job category, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[8]

(b) A list of all employees as of the July 1, 1994, payroll period for the first report and as of the July 1, 1995, and July 1, 1996, payroll periods for the second and third reports by job title and FCC job category, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

19. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

20. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

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[7] In view of the pending assignment application for KKIS(AM), we note that upon grant of the application, the reporting conditions will follow the license and pass automatically to the assignee. *See Woolfson Broadcasting, Inc.*, 4 FCC Rcd 6160 (1989).

[8] Such a list might start: 1) News Director: Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T
	1 Hispanic male	National Hispanic Media Coalition
	1 Black female	NAACP

Sources contacted - Local newspaper, A.W.R.T., National Hispanic Media Coalition and NAACP

Selected - Hispanic male (08/19/91)

21. Should you have any questions regarding this action or require further information concerning employment reports, you may call the Mass Media Bureau's EEO Branch at (202) 632-7069. With respect to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this Order. Any comments concerning the ability to pay should include those financial items set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 10, 1993

US WEST, RANGE TELEPHONE, RT COMMUNICATIONS, TRI-COUNTY TELEPHONE, TCT WEST, AND UNION TELEPHONE FILE JOINT PETITION FOR WAIVER OF STUDY AREA DEFINITION (PART 36 APPENDIX-GLOSSARY) AND PRICE CAP "ALL OR NOTHING" RULE (SECTION 61.41(c) AAD 93-95)

Comment Date: September 7, 1993
Reply Date: September 28, 1993

On July 27, 1993, US West Communications, Inc. (US West), Range Telephone Cooperative, Inc. (Range), RT Communications, Inc. (RTCI), Tri-County Telephone Association, Inc. (Tri-County), TCT West (TCT), and Union Telephone Company (Union) filed a joint petition for waiver of the definition of "study area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the parties to reflect the changes in their study area boundaries that would result from the sale from US West to RT (a wholly-owned subsidiary of Range), TCT (a wholly-owned subsidiary of Tri-County), and Union of 27 exchanges in Wyoming. RT and TCT seek to establish two new study areas for the purchased exchanges; Union seeks to add purchased exchanges to its existing study area. The purchasing parties also seek waiver of the price cap rules at Sections 61.41(c) and (d) and, if needed, 69.3(e)(11), to exempt them from the price cap "all or nothing" rule and allow them to operate as cost companies and to participate in the NECA common line and traffic sensitive pools. The parties state that this transaction is currently pending before the Wyoming Public Service Commission.

Parties may file comments on this petition no later than September 7, 1993. Replies should be filed by September 28, 1993. Comments should reference AAD 93-95. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from ITS.

For further information contact Jacky Spindler at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-193
Phase II

In the Matter of

AT&T Communications
Tariff F.C.C. Nos. 1 and 2
Transmittal Nos. 5460, 5461,
5462 and 5464

MEMORANDUM OPINION AND ORDER SUSPENDING RATES AND DESIGNATING ISSUES FOR INVESTIGATION

Adopted: August 9, 1993; Released: August 10, 1993

By the Acting Chief, Common Carrier Bureau:

1. On July 16, 1993, the AT&T Communications (AT&T) filed its Transmittal Nos. 5460, 5461, 5462 and 5464.[1] Transmittal 5460 would increase the initial minute rate and the additional minute rate in certain rate periods for AT&T's International Message Telecommunications Service (IMTS) from the U.S. mainland to Canada. This filing also would increase the additional minute rate in certain rate periods for IMTS from the U.S. mainland to 58 countries and from Hawaii to Canada. Transmittal 5460 also would revise the IMTS rate period hours for Bhutan and Uruguay. Transmittal 5461 would increase certain rates applicable to AT&T 800 directory assistance, while Transmittal 5462 seeks to increase the rates for AT&T's long distance message telecommunications service basic schedule, AT&T operator handled calling, AT&T calling card, AT&T's commercial long distance service, AT&T IMTS and AT&T USADirect® service. Transmittal 5464 would increase price cap regulated rates for analog voice grade services, with the exception of ALLIANCE® dedicated teleconferencing service; terrestrial television services, with the exception of educational television services; and certain special government services.

2. Local exchange carriers (LECs) filed their 1993 annual access tariffs on April 2, 1993. Several LECs subject to price cap regulation included adjustments to their price cap indices and rates based on exogenous treatment of certain amounts associated with accounting changes for retiree benefits. On May 17, 1993, AT&T announced revisions to its price cap indices effective July 1, 1993, reflecting the LECs' proposed changes in access prices and exogenous cost changes AT&T itself experienced.[2] On June 23, 1993, the Common Carrier Bureau released an order[3] that, *inter alia*, suspended for one day and set for investigation rates of certain local exchange carriers that reflected the exogenous treatment of transitional benefit obligation (TBO) amounts.[4] By letter of June 30, 1993, AT&T made further adjustments to its price cap indices, effective July 1, 1993, including adjustments for exogenous treatment of its own TBO amounts.

3. The captioned transmittals would increase rates in Baskets 1, 2 and 3. These rate increases would be within bands and below the cap established by AT&T's recent adjustments to the indices; however, the revised rates in Baskets 1 and 2 would exceed these limits if the indices were adjusted to exclude TBO amounts. Therefore, some amount of the rate increase represented by the captioned transmittals is directly related to the exogenous treatment of TBO amounts by LECs in their 1993 annual access filings, and a portion is directly attributable to the TBO amounts claimed by AT&T as exogenous costs.[5] The LEC rates based on exogenous treatment of TBO amounts are currently subject to an accounting order and a Section 204(a) investigation. Thus, to preserve the rights of ratepayers to a refund if AT&T is refunded money by the LECs, and because AT&T's claim of its own TBO costs raises substantially the same issues being addressed in the LEC investigation, it is appropriate to include AT&T's rates in the LEC investigation.

4. Therefore, pursuant to Section 204(a) of the Communications Act[6] and Section 0.291 of the Commission's rules,[7] we hereby institute an investigation of AT&T's proposed tariff changes based on the flow-through of LEC TBO amounts and based on the claims for exogenous treatment of AT&T's own TBO amounts. We suspend the affected transmittals for one day, impose an accounting order, and expand our investigation in CC Docket No. 93-193 to include the captioned transmittals. We designate the LEC portion of the investigation as "Phase I" and the AT&T portion of the investigation as "Phase II." We will not at this time designate issues and establish a pleading cycle for Phase II of the investigation, pending consideration of the record in Phase I.

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[1] A portion of Transmittal No. 5460 bears an effective date of August 30, 1993.

[2] Letter from M. F. Del Casino to D. R. Searcy (May 17, 1993). AT&T did not amend rates for any tariffed services at that time, and therefore did not amend its price cap indexes in a tariff transmittal.

[3] Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation, CC Docket No. 93-762, DA 93-193 (released Jun. 23, 1993) (*1993 Annual Access Order*).

[4] In December 1990, the Financial Accounting Standards Board (FASB) adopted SFAS-106, requiring that companies account for postretirement benefits other than pensions (OPEBs) on an accrual basis, to begin after December 15, 1992. Before SFAS-106, OPEBs were accounted for on a "pay-as-you-go" basis. Under accrual methods, OPEBs are treated as deferred compensation earned by employees as they work. SFAS-106 also requires companies to book previously unaccrued obligation amounts for OPEBs to retirees and active employees existing as of the adoption date. This amount is termed the transitional benefit obligation (TBO).

[5] Approximately $210 million was claimed as exogenous by the price cap LECs. AT&T's claimed TBO amounts increase its price cap levels by approximately $243 million.

[6] 47 U.S.C. § 204(a).

[7] 47 C.F.R. § 0.291.

ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revised rates for Baskets 1, 2 and 3 set forth in AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462 and 5464 ARE SUSPENDED for one day from the current effective date and a separate phase of our investigation in CC Docket No. 93-193 to investigate those rates is instituted. AT&T Communications SHALL FILE a supplement reflecting this suspension no later than 5 days from release of this Order.

6. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, AT&T Communications SHALL KEEP ACCURATE ACCOUNT of all amounts received that are associated with the rates that are the subject of this investigation.

7. IT IS FURTHER ORDERED that subsequent transmittals revising rates in Baskets 1, 2 and 3 are subject to the investigation and accounting order to the extent AT&T exercises pricing flexibility resulting from changes in its price cap indices as a result of LEC access charge changes or AT&T's own OPEB costs.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc. AAD 92-70

and

Wiggins Telephone Association

Joint Petition for Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary, of the Commission's Rules

and

Wiggins Telephone Association

Petition for Waiver of Section 61.41(c)

MEMORANDUM OPINION AND ORDER

Adopted: August 5, 1993; Released: August 10, 1993

By the Acting Chief, Common Carrier Bureau:

1. In this Order we consider a joint petition filed by US West Communications, Inc. (US West) and Wiggins Telephone Association (Wiggins) for waiver of the Commission's rules regarding study areas and price cap regulation.

I. INTRODUCTION AND BACKGROUND

2. On September 24, 1992, US West and Wiggins filed a joint petition for waiver of the definition of study area contained in the Appendix-Glossary of Part 36 of the Commission's rules. On September 25, 1992, Wiggins filed a related petition for waiver of Section 61.41(c) of the Commission's rules, requesting permission to remain a cost company and NECA pool participant. We placed these petitions on public notice on October 23, 1992.[1] We received comments in support of the request from the National Exchange Carrier Association (NECA).

II. STUDY AREA WAIVER

3. The definition of study area contained in Part 36, Appendix-Glossary, of the Commission's rules states that study area boundaries shall be frozen as they were on November 15, 1984.[2] Companies wishing to change their study area boundaries can request a waiver of that rule. The Commission's three primary concerns in study area boundary change petitions are that the change have no adverse impact on the Universal Service Fund (USF) support program,[3] that the state commission(s) having regulatory authority not oppose the change,[4] and that the public interest be served.

4. The service area in question here, the Hereford and South Pine Bluffs (H&SPB) exchanges, is being sold by US West to Wiggins. The service area is located in the northeast section of Colorado and is currently served by Wyoming exchanges situated in the Wyoming LATA. It consists of 87 business and residential access lines. The parties state that there will no adverse impact of this transaction on the separations factors, and that the impact on the high cost fund will be minimal.

A. Universal Service Fund (USF) Impact

5. USF support is calculated based on the cost per loop within a study area. The US West-Colorado study area has costs per loop below the national average and receives no high cost assistance.[5] The joint petition states that the per loop cost of the Wiggins study area after the acquisition of the H&SPB Service Area will increase by $4.67, resulting in additional high-cost assistance of approximately $10,000 per year.[6] The joint petition argues that this amount is *de minimis* when considered as a percentage of the total USF support program. In its comments, NECA also states that the sale will have a *de minimis* effect on the NECA pools, Long Term Support, and the USF, and will impose no significant administrative burdens on NECA.

6. NECA asserts in this and other proceedings that $10,000 is a *de minimis* addition to high cost fund requirements when viewed in terms of the total fund. The high cost fund has grown at a substantial and unanticipated rate in the past few years; taking the approach advocated by NECA could result in its continued unbridled growth, since the increment to the USF associated with the sale of virtually any individual exchange could be characterized as '*de minimis*' in comparison to a nationwide total of some

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[1] Public Notice, 7 FCC Rcd 8538 (Com. Car. Bur. 1992).

[2] 47 C.F.R. Part 36, Appendix-Glossary.

[3] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 18318 (November 15, 1984) (*Joint Board Recommended Decision);* 49 Fed. Reg. 48325 (December 12, 1984) (*Joint Board Order*) at para. 65.

[4] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 5 FCC Rcd 5974 (1990). The Commission therein describes the factors that led to the present restriction on study area changes and the reasons why it is proposing to change that restriction.

[5] US West's average loop cost in the Colorado study area prior to the sale of the H&SPB Service Area was $192.54, well below the national average loop cost of $231.09. The proposed sale will lower US West-Colorado's cost per loop still further. Joint Petition at 6.

[6] Wiggins currently serves some 1153 customers; its high costs are due to the extreme sparseness of the population in its service area. Wiggins plans to serve H&SPB from an existing digital switch in the town of Grover, Colorado. Wiggins plans to install buried plant, at a cost of about $225,000, to serve the 87 customers. *See* letter from Dwight Schmitt, President, Wiggins Telephone Association, May 14, 1993.

$700 million. We conclude that our established approach should continue to apply: any request for waiver that will add to the USF total must be examined to ascertain that it is a properly justifiable addition to the subsidy fund, not merely that it would increase the fund by a *de minimis* amount.

7. The Commission requirement that study area boundaries be frozen is intended, generally, to prohibit companies from establishing high cost exchanges as separate companies within or adjacent to their existing service territories in order to maximize high cost support.[7] Both the study area definition (Part 36 Appendix-Glossary) and the USF rules (§36.601 *et seq.)* were initiated by the Joint Board Recommended Decision of 1984, and their creation and the concerns they reflect are intertwined.[8] Because USF support is calculated based on study area data, freezing study area boundaries was implemented as a means of controlling unreasonable USF growth.

8. The instant case presents strong arguments for study area waiver in that the unique circumstances of this service area indicate that Wiggins is in a better position than US West to satisfy these customers' needs and provide a higher level of services. See para. 14, *infra.* The arguments for increased USF support, however, are more difficult. In addition to the information contained in the joint petition, Wiggins has submitted at our request a letter with attachments to provide more detail on its service area and on existing facilities in the service area it hopes to acquire, as well as on its plans to upgrade service in that area.[9] Wiggins' consultant provided, at our request, additional financial and cost information in two filings.[10] These submissions provide additional detail for our analysis of the USF impact of Wiggins' purchase. *TCA Submission 2* indicates a plan to invest $225,000 in the first year in order to achieve the proposed upgrades, and states that this investment, combined with the existing loop cost of the purchased loops and Wiggins' existing loops, will produce an average USF increase of $8,397 per year for the year of transfer and the next four years.

9. The Commission accepted the Joint Board's recommendation that study area boundaries be frozen in order to control the growth of the USF. Now we find that good cause exists to change a study area boundary to allow Wiggins to serve the H&SPB area. Rather than insist that the customers in this area continue to be served by US West using older technology and less than optimal service patterns, we are eager that they be served by a local company in their community of interest, and that they be provided with modern technology and capabilities. We are still, however, cognizant of the Joint Board's intention, approved and enacted by the Commission, to restrain the growth of the high cost fund.

10. Both purposes can be served simultaneously. The parties have established the need for a study area boundary change. Accordingly, we will waive the Part 36 Appendix-Glossary study area definition to allow Wiggins to add, and US West to subtract, this service area from the existing study area boundaries. In addition, the parties have calculated the impact on USF of their transaction and the upgrades discussed herein. The amount of additional USF support they project, just under $10,000 per year, is a substantial cost, especially considering that only 87 lines are being added. Nonetheless, because we strongly support the service upgrades they promise, and the likelihood of better service generally to these customers, we will allow the additional USF support they calculate is needed. While different sums have been provided as the likely additional USF support, the most recent being $8,397, we will allow Wiggins to claim as much as $10,000 additional USF, to assure that it is able to accomplish its goals for the H&SPB exchange.[11] We accordingly grant the requested study area waiver, on the condition that any USF increase associated with the addition of the H&SPB area not exceed $10,000 for the next three years, or until the resolution of the USF questions presently before the Joint Board, whichever is shorter. At that time we will revisit this issue if Wiggins so requests. In this way, Wiggins is free to acquire and serve the H&SPB area, and the Universal Service Fund is protected from unrestrained demands.

B. State commission approval

11. The Petition, in Appendix A and Appendix B, contains the Orders of the Public Service Commission of Wyoming (PSCW) and the Public Utilities Commission of the State of Colorado (CPUC), respectively, both approving this transaction.[12] The inclusion of these orders serves to address our requirement that relevant state commissions not oppose a proposed study area change.

12. The CPUC Order stipulates that Wiggins request FCC approval to adopt for interstate purposes the same accounting treatment sanctioned by the CPUC for the intrastate portion of the instant transaction. Wiggins is purchasing H&SPB at less than US West's net book value of the plant to be transferred. Therefore, Wiggins requests that for interstate reporting purposes it will record, as a negative plant acquisition adjustment in Account 32.2005, the difference between the sale price and the net book value of the acquisition. Wiggins requests approval to amortize this negative plant acquisition adjustment to the income statement as an offset to the depreciation of the net book value of the plant acquired.[13] As a result, the net depreciation and amortization expense is equivalent to the purchase price paid by Wiggins rather than the net book value of the

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[7] *Joint Board Recommended Decision* at para. 65-66; *Joint Board Order* at para. 7.

[8] The rule section regarding the weighted DEM (dial equipment minutes) allocator that allows very small companies to triple their assignment to the interstate jurisdiction is also an intrinsic part of this program. *See generally Joint Board Recommended Decision; see* §36.125 of the Commission's rules.

[9] Letter from Dwight E. Schmitt, General Manager, Wiggins Telephone Assoc., to Kenneth P. Moran, Chief, Accounting and Audits Division, May 17, 1993.

[10] Tallon, Cheeseman & Assoc., Inc. submissions of June 11, 1993 and June 15, 1993 (*TCA Submission 1* and *TCA Submission 2*).

[11] By this maximum amount, we mean that in no year will Wiggins' draw on USF support be higher by more than $10,000 than it would have been if Wiggins had never acquired the 87 H&SPB lines.

[12] PSCW Docket No. 70000-TT-92-116 issued September 1, 1992; and CPUC Docket No. 92A-344T, adopted July 31, 1992.

[13] Wiggins should include the difference between the purchase price paid and the net book value of the plant acquired in Account 2005 and exclude this amount from the rate base.

H&SPB Service Area.[14] We believe this accounting treatment will serve to reduce any adverse impact on Wiggins' interstate tariffs, and we accordingly grant our approval.

C. Public Interest

13. The joint petition states that the public interest is served by the instant sale and transfer. The H&SPB service area is currently served by Wyoming exchanges, but it is in Colorado, and is surrounded by the area served by Wiggins. The community of interest of customers within the H&SPB area is Grover, Colorado. Currently in order to place calls within their community of interest, customers must make an interLATA toll call. Further, H&SPB customers are currently served by multi-party lines, and are deprived of access to E911 and toll-free state 800 service. When served by Wiggins, these customers will have toll-free local calls within their community of interest, access to E911 and Colorado 800 numbers (including government), and single-party service with modern capabilities through a digital switch. Wiggins notes its intention to remove and discard the overhead wires on old pole lines, and to provide buried cable to provide service from the existing Grover digital switch.[15] Wiggins has already begun a construction program and with Commission approval will complete construction expeditiously, to provide customers in the H&SPB service area a level of service not presently available. We agree that the public interest is served by the sale and transfer of the H&SPB service area.

III. PRICE CAPS WAIVER

14. On September 25, 1992, Wiggins filed a petition for a declaration of inapplicability of the Commission's rules governing the acquisition of price cap companies by non-price cap companies, or alternatively, for waiver of those rules. Only NECA commented on this petition.[16]

15. Section 61.41 of the Commission's rules provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.[17] Under this rule, Wiggins' acquisition of the US West H&SPB service area obligates it to exit the NECA pools and become subject to price cap regulation. Wiggins requests waiver of this rule because the rule's application here would be contrary to the public interest.

16. Wiggins notes that the CPUC found that Wiggins was financially able to provide more appropriate and valuable service to the H&SPB customers than US West, and that US West's financial condition would not be adversely affected by the transaction. Wiggins also notes that the Petition to the CPUC was prompted in part by a petition signed by approximately 65 US West subscribers residing in the H&SPB territory requesting that service be provided by Wiggins rather than US West. This request was unopposed in the H&SPB territory. Moreover, even though US West was willing to upgrade its facilities in the territory to provide one-party service, the CPUC found that this would not satisfy the concerns of the customers in this area as they would still be served from the Wyoming LATA and deprived of the benefits of US West's Switch And Facilities Enrichment Program and the Local Calling Area Plan.

17. Further, Wiggins states, it has no incentive, ability, or inclination to "game" the Commission's price cap policies. Wiggins accordingly requests a waiver of the §61.41 "all or nothing" rule. Wiggins notes that there is no relationship between US West and Wiggins that would allow either company to shift costs as a consequence of this sale, and that neither carrier is using this sale as a means of choosing a different system of regulation than the *status quo*. Finally, Wiggins states that a requirement that it withdraw from the NECA pools and operate as a price cap company would subject it to administrative and financial burdens that would jeopardize its ability to meet its technological upgrade commitments to customers.

18. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[18] The rationale for this rule is stated in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift its costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) without affecting the earnings of the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Second, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to an efficient level. *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706. The Commission stated, however, that "in some cases, the efficiencies created by the purchase and sale of one or two exchanges may outweigh the threat of 'gaming the system.' Such cases might justify narrow waiver of the all-or-nothing rule." *Id.* at note 207.

19. There is good cause to grant Wiggins a waiver of the all-or-nothing rule. The first concern cited by the Commission -- cost-shifting between affiliates -- is not at issue here. Neither Wiggins nor US West is seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rule -- allowing a company to use mergers and acquisitions as a means of choosing regulatory systems and "gaming" -- is also not raised on the facts of this case. Except for the H&SPB service area it has sold to Wiggins, US West remains regulated under price caps; it retains no ability to bring this single exchange back under price caps.

20. Further, the Commission has always been sensitive to the administrative burdens imposed on small carriers by the application of Commission rules.[19] In the *LEC Price*

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[14] *See* Attachment to CPUC Order, Page 7 of 7 pages.

[15] Wiggins Letter at 2-3.

[16] Comments filed November 6, 1992, supporting the request.

[17] 47 C.F.R. §61.41(c)(2).

[18] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), *petitions for further recon. pending, appeal docketed sub nom. D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

[19] *See, e.g.*, the Commission's proceeding to develop incentive plans specifically designed for smaller LECs: Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of

Cap Order, the Commission recognized that small telephone companies should not be forced into a regulatory regime that was designed based largely on the historical performance of the largest local exchange carriers. The Commission therefore made price cap regulation optional for carriers below the largest eight. Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Companies, our application of the all-or-nothing rule must take into account small companies' needs.

21. We therefore grant a waiver of the all-or-nothing rule. For the present, Wiggins will be regulated under rate of return and, as with any other rate of return carrier, will be free to elect price cap regulation in the future, provided it withdraws from the NECA pools.

IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the Joint Petition of US West Communications, Inc. and Wiggins Telephone Association, for waiver of Part 36, Appendix-Glossary, of the Commission's Rules IS GRANTED subject to the condition set forth above.

23. IT IS FURTHER ORDERED that the Petition of Wiggins Telephone Association, for waiver of Section 61.41(c) of the Commission's Rules, 47 C.F.R. Section 61.41(c), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

Proposed Rulemaking, 2 FCC Rcd 1010 (1986); Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-213

In the Matter of

Transport Rate Structure and
Pricing

SECOND MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: August 17, 1993; Released: August 18, 1993

By the Commission:

1. On October 16, 1992, we released an order establishing interim rules to govern the rate structure and pricing of the transport component of interstate switched access provided by local exchange carriers (LECs) to enable interexchange carriers (IXCs) to originate and terminate interstate traffic.[1] On July 21, 1993, we released an order reconsidering and clarifying certain issues on which guidance was needed before the LECs file their initial transport rates.[2] In this order, on our own motion, we further reconsider the manner in which the interconnection charge is determined.

2. In the *Transport Order*, we adopted an interim transport rate structure consisting of rate elements for entrance "facilities, direct-trunked transport, tandem-switched transport, and the interconnection charge.[3] In that order, we concluded that the interconnection charge should initially be priced on a residual basis so that the transport rate restructure would be revenue neutral for the LECs.[4] We permitted the LECs to set the interconnection charge based on projected demand after IXC reconfigurations have occurred, but required them to take into account other demand for the same facilities in order to prevent double recovery.[5] Because of the difficulty in projecting IXC reconfigurations, we also established a true-up procedure to compare the projected demand used to calculate the interconnection charge with the actual demand during the first six months after the implementation of the interim transport rules.

3. In the *Reconsideration Order*, we reaffirmed that the interconnection charge was to be revenue neutral. However, because of LEC incentives to project reconfigurations in a manner that would maximize the interconnection charge, and because of the difficulty of evaluating those projections, we concluded that the LECs should be required to use historical facility demand in computing the initial interconnection charge.[6] We permitted LECs to seek mid-course adjustments to the interconnection charge, based in part on reports of actual demand results.[7] In addition, we required the LECs to divide the interconnection charge revenue requirement by the projected number of switched minutes in computing the initial interconnection charge.[8]

4. As noted above, the earlier transport decisions concluded that the transport restructure should be revenue neutral, *i.e.*, during the initial year after the transport rate restructure is implemented, the LECs should have the opportunity to receive the same revenues under the new rate structure they would have received under the equal charge rule. A further review of the methodology adopted in the *Reconsideration Order* reveals that it would not, in fact, achieve the intended revenue neutrality. Under that methodology, a revenue requirement reflecting a prior year's demand would be divided by a projected minutes of use factor reflecting demand growth occurring in the subsequent year. Dividing historical revenues by projected demand would produce a lower rate for the interconnection charge than would occur if the demand for the historical period were used. The resulting lower rate would not give the LECs the opportunity to realize the revenues they would have received under the equal charge rule. LECs therefore would be left with less revenue during the initial year after the transport rate restructure is implemented than if switched transport had continued to be provided under the equal charge rule.

5. To correct this technical defect in the methodology adopted in the *Reconsideration Order*, we are modifying the requirement that LECs use projected demand in calculating the interconnection charge. In a typical restructure under the price cap rules, historical demand and revenue data would be used to determine compliance with price cap constraints. While the transport restructure adopted in this proceeding is not a typical restructure in many respects, we conclude upon further review that the use of historic revenue and demand data will produce the revenue neutrality for the LECs that we intended for this restructure. Accordingly, we will require the LECs to use historic demand for all demand components of the formula.

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[1] *Transport Rate Structure and Pricing*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 91-213, 7 FCC Rcd 7006 (1992) (*Transport Order*).

[2] *Transport Rate Structure and Pricing*, First Memorandum Opinion and Order on Reconsideration, CC Docket No. 91-213, FCC 93-366 (released July 21, 1993) (*Reconsideration Order*).

[3] *Transport Order*, 7 FCC Rcd at 7009-12, ¶ ¶ 5-14.

[4] This can be expressed in a formula as follows:

Equal charge rate x MOU demand = (Facility-based charges x Facility demand) + (Interconnection charge rate x MOU demand) *See Reconsideration Order*, ¶ 45 n.68.

[5] *Transport Order*, 7 FCC Rcd at 7039-40, ¶ ¶ 63-64.

[6] Examples of facility demand are demand for entrance facilities, direct-trunked transport, and tandem-switched transport.

[7] Such an adjustment will be permitted if a LEC can demonstrate that: (1) actual demand for interstate transport facilities is significantly less than the historical demand used to set the interconnection charge due to IXC network reconfigurations resulting from the transport rate restructure; and (2) the LEC has not been able to put its facilities to alternative uses. *See Reconsideration Order*, ¶ 53.

[8] *Reconsideration Order*, ¶ ¶ 51-55.

6. The use of historical demand will also eliminate the need for a true-up for forecasting errors in estimating the number of minutes used in calculating the rate for the interconnection charge since an estimate of minutes will no longer be used. Thus, the true-up procedures will only apply to those divergences from historical demand used in initializing demand for facility charges, as discussed in the *Reconsideration Order*.[9]

7. Accordingly, IT IS ORDERED that pursuant to authority contained in Sections 1, 4(i) and (j), 201-205, 218, 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 218, 220, and 403, and pursuant to Section 1.108 of the Commission's rules, 47 C.F.R. § 1.108, the Commission RECONSIDERS its decision in Transport Rate Structure and Pricing, First Memorandum Opinion and Order on Reconsideration, CC Docket No. 91-213, FCC 93-366 (released July 21, 1993), on its own motion to the extent specified herein.

8. IT IS FURTHER ORDERED that Part 69 of the Commission's rules IS AMENDED as set forth in Appendix A.

9. IT IS FURTHER ORDERED that the decisions and rules adopted herein SHALL BE EFFECTIVE on September 1, 1993.[10]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

PART 69 -- ACCESS CHARGES

Part 69 of Title 47, Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 69 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 69.108 is amended by revising paragraph (c) 'o read as follows:

§ 69.108 Transport rate benchmark.

* * * * *

(c) If a telephone company's initial transport rates are based on special access rates with a DS3-to-DS1 benchmark ratio of less than 9.6 to 1, those initial transport rates will generally be suspended and investigated absent a substantial cause showing by the telephone company. Alternatively, the telephone company may adjust its initial transport rates so that the DS3-to-DS1 ratio calculated as described in (a) of those rates is 9.6 or higher. In that case, initial transport rates that depart from existing special access rates effective on September 1, 1992 so as to be consistent with the benchmark will be presumed reasonable only so long as the ratio of revenue recovered through the interconnection charge to the revenue recovered through facilities-based charges is the same as it would be if the telephone company's existing special access rates effective on September 1, 1992 were used.

3. Section 69.124 is amended by revising paragraph (b)(1) to read as follows:

§ 69.124 Interconnection charge.

* * * * *

(b)(1) For telephone companies not subject to price cap regulation, the interconnection charge shall be computed by subtracting entrance facilities, tandem-switched transport, direct-trunked transport, and dedicated signalling transport revenues from the Part 69 transport revenue requirement, and dividing by the total interstate local switching minutes.

* * * * *

[9] *Reconsideration Order*, ¶ 54.

[10] Because the tariffing rules governing the tariffs to be filed on September 1, 1993, will become effective on that date, good cause exists to make these related modifications effective on the same date.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-308

In re Applications of

LINDA U. KULISKY	File No. BPH-901024MD
LYNDA F. HASKINS	File No. BPH-901025ME
GILFORD BROADCASTING COMPANY	File No. BPH-901025MF

For Construction Permit for a New FM Station on Channel 245A in Tavernier, Florida

Appearances

Robert W. Healy on behalf of Linda U. Kulisky; *George L. Lyon, Jr.* and *Marjorie K. Conner* on behalf of Lynda F. Haskins; and *David Honig* on behalf of Gilford Broadcasting Company.

DECISION

Adopted: August 12, 1993; Released: August 31, 1993

By the Review Board: MARINO (Chairman) and GREENE. Board Member BLUMENTHAL Concurring in Part and Dissenting in Part with Statement.

Board Chairman MARINO:

1. Before the Review Board is the *Initial Decision* (*I.D.*) of Administrative Law Judge Edward Luton (ALJ), 7 FCC Rcd 3894 (1992), which granted the application of Gilford Broadcasting Company for authority to construct a new FM station on Channel 245A at Tavernier, Florida, and denied the competing applications of Linda U. Kulisky and Lynda F. Haskins. Although the *I.D.* determined that each of the applicants is qualified and merits full credit for its proposal to integrate its owner into station management, the *I.D.* concluded, applying the principles enunciated in the Commission's *Policy Statement on Comparative Broadcast Hearings* (*Policy Statement*), 1 FCC 2d 393 (1965), that grant of Gilford's application would best serve the public interest due to its superior enhancements to integration for its principal's minority status and future local residency. *I.D.*, ¶ ¶ 43-45. The three parties have filed exceptions and replies to the *I.D.* Based on our review of the *I.D.* in light of the record, we affirm and do not find it necessary to hold oral argument in this proceeding.

2. Because the ALJ determined that the applicants were equal in all other respects, the outcome of the proceeding hinged on the relative value of the enhancements to their comparative proposals -- the qualitative integration credit awarded for their principals' possession of the preferred attributes. *See Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5066 (1989). Under the *Policy Statement*, which continues to govern our analysis of comparative proceedings for new broadcast facilities during the pendency of *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992), applicants integrating their principals into station management may receive significant preferences if their proposals satisfy the fundamental licensing criteria of local familiarity, which includes past residence in the community of license and involvement in civic activities, and minority ownership. 1 FCC 2d at 395-96; *see generally Ronald Sorenson*, 6 FCC Rcd 1952, *recon. dismissed*, 6 FCC Rcd 6901 (1991); *Radio Jonesboro, Inc.*, 100 FCC 2d 941 (1985); *Waters Broadcasting Corp.*, 91 FCC 2d 1261 (1982), *aff'd sub nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). Past broadcast experience merits minor comparative credit. 1 FCC 2d at 396. Additional credit of varying comparative weight is available for, *inter alia*, efficient use of the frequency and auxiliary power. *Id.* at 397-99; *Addendum to Policy Statement of July 28, 1965, on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966).

3. *Comparative Evaluation.* Linda Kulisky, an individual applicant, received "moderate" comparative credit from the ALJ for her residence in the service area since 1982 and participation in civic activities from 1986 to 1991 including involvement with her church, her daughter's Girl Scouts troop and school, Florida Keys Children's Shelter, Mariner's Hospital, and Cystic Fibrosis. *I.D.*, ¶ ¶ 5, 31. Kulisky also secured "slight" credit for broadcast experience consisting of a position in the traffic/continuity department of KMOX, St. Louis, Missouri from 1968 to 1969; traffic director and then secretary to the station manager of WICD-TV, Champaign, Illinois from 1969 to 1973; and various volunteer activities for two Illinois public television stations from 1974 to 1976. *Id.* at ¶ ¶ 6, 31. Lynda Haskins, an individual applicant, received "slight" credit for her promise of future service area residency. *Id.* at ¶ 34. Gilford's proposal garnered "substantial" credit for 100% stockholder Vera Gilford's minority status and further "slight" credit for her promise of future local residency. *Id.* at ¶ 39. Each applicant received offsetting credit for its auxiliary power proposal. *Id.* at ¶ 43.

4. Acknowledging that "minority ownership and local residence (now including civic participation)" have equal significance under the Commission's licensing scheme, the ALJ determined that, under the particular facts of this case, the enhancement for minority status nevertheless outweighed that for residence in the service area and civic involvement. *Id.* at ¶ 45. He explained:

> Residency in the community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). In the instant case, then, the 100% minority enhancement awarded to Gilford has more significance than the 100% service area preference accorded to Kulisky. Although residence in the community of license is equal in weight to minority ownership, Kulisky is here credited only with residence in the service area, generally of lesser weight. Kulisky's slight enhancement for broadcast

> experience, and Gilford's slight enhancement for a promise of future local residence, cancel one another leaving Gilford the preferred applicant herein.

I.D., ¶ 45. Haskins placed last in the comparative ranking and does not challenge the comparative superiority of her opponents' proposals. *Id.* at ¶ 44.

5. Kulisky strenuously excepts to the *I.D.'s* analysis of her comparative proposal, asserting that the ALJ underrated her residence, ignored her record of civic involvement, and erroneously treated Gilford's minority enhancement as a *per se* advantage. Kulisky Exceptions at 5-8. Kulisky initially maintains, citing *Joe L. Aldridge*, 6 FCC Rcd 994, 995 (Rev. Bd. 1991), that she should receive maximum credit under the residence factor to reflect local, not service area residence because she lives in a community that is adjacent to the community of license. Kulisky Exceptions at 5-6. Kulisky argued below that her home, which has an Islamorada address, is three or four miles from the town of Tavernier and across the highway from properties with Tavernier addresses, and that Islamorada and Tavernier are "contiguous" communities. Kulisky Exh. 3; Tr. 134. Kulisky first claimed local residence credit under the adjacent community theory in an integration statement filed with the ALJ. She later reiterated the claim in her direct written case. However, in Kulisky's *original* integration proposal, which was appended to her application and in place at the deadline for amending applications as a matter of right, she reported that she sought credit only for service area residence. FCC Form 301, Section IV-B & Exh. 2. We conclude that the *I.D.* properly limited Kulisky's enhancement credit to that commensurate with service area residence which, as accurately noted by the ALJ, is generally of lesser comparative weight than residence within the principal community. 1 FCC Rcd at 396.

6. In an effort to facilitate early settlements and to expedite the processing of applications for commercial broadcast stations, the Commission revised FCC Form 301 in 1989 to require applicants to submit their integration proposals no later than the expiration of the amendment-as-of-right period. *Revision of Application for Construction Permit for Commercial Broadcast Station*, 4 FCC Rcd 3853, 3860 (1989). Formerly, integration statements were not filed until the hearing phase of the proceeding, at the discretion of the presiding officer. *See, e.g., Julia S. Zozaya*, 5 FCC Rcd 6607, 6608-10 & n.7 (1990) (subsequent history omitted). Under the hearing reform measures adopted by the Commission in 1991, subsequent to the application filings in this case, integration statements must also be filed with the ALJ shortly after designation for hearing. This second integration submission, however, "does not give rise to an opportunity to upgrade any previously submitted integration proposal." *Proposals to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 3403, 3409 n.3 (1991).

7. In accordance with these measures, the Tavernier applicants were required to disclose their integration proposals and all claims to qualitative credit under the enhancement factors, specifically including both local residence and service area residence, by the amendment-as-of-right date. 4 FCC Rcd at 3864 (Instructions for Section IV - Program Service Statement). Therefore, because Kulisky sought only service area residence in her original integration proposal, and she chose not to reveal her intention to claim further credit under the adjacent community doctrine until long after the passage of the cut-off date froze her comparative proposal, Kulisky's post cut-off claim to local residence credit is precluded by law as an impermissible comparative upgrade. *See Alexander S. Klein, Jr.*, 86 FCC 2d 423, 434-35 (1981); *Northland Communications*, 100 FCC 2d 914, 915-17 (Rev. Bd. 1985), *rev. denied*, 60 RR 2d 776 (1986), *aff'd by judgment sub nom. Up North Broadcasting Co. v. FCC*, 814 F.2d 774 (D.C. Cir. 1987). Even had her claim been timely made, Kulisky's proposal would not merit enhanced credit for adjacent community residence. The map submitted into evidence, Kulisky Exh. 3, Attachment 1, does not clearly support a finding that Islamorada and Tavernier are contiguous; *i.e.*, bordering, adjoining, or abutting each other. *See Edward F. and Pamela J. Levine*, 8 FCC Rcd 2630, 2631 (Rev. Bd. 1993); *Aldridge*, 6 FCC Rcd at 995. Moreover, Kulisky has not shown that the two communities are "essentially inseparable." *Richardson Broadcasting Group*, 5 FCC Rcd 6364, *recon. aff'd*, 5 FCC Rcd 6964 (Rev. Bd. 1990) (further subsequent history omitted). Finally, we disclaim Kulisky's further suggestion that service area residence proximate to the principal community merits more credit than residence at the fringes of the service contour. Kulisky Exceptions at 6. *See Levine*, 8 FCC Rcd at 2632 (no sliding scale mechanism for crediting service area residence based on distance from principal community); *Coastal Broadcasting Partners*, 6 FCC Rcd 4242, 4246 (Rev. Bd. 1991) (same), *modified on other grounds*, 7 FCC Rcd 1432, *recon. denied*, 7 FCC Rcd 6594 (1992); *see also Waters*, 91 FCC 2d at 1263 ("moderate" enhancement credit awarded for residence and civic participation in community 30 miles from community of license but within the service area).

8. Kulisky next asserts that the ALJ ignored her record of civic involvement in awarding only a "moderate" comparative credit for her showing under the unified factor, whereas he accorded Gilbert "substantial" credit for minority status, thus in effect elevating the minority enhancement to a *per se* advantage. Kulisky Exceptions at 7-8. Kulisky's argument is grounded on the premise that residence unaccompanied by civic involvement is equivalent to minority status, and, thus, that her enhancement credit for residence conjoined with that due for her civic involvement outweigh Gilford's minority enhancement. Kulisky is mistaken. In formulating the comparative analysis, local residence of participating owners was considered an enhancement to integration because it "indicates a likelihood of continuing knowledge of changing local interests and needs." *Policy Statement*, 1 FCC 2d at 396. Civic activities "indicating a knowledge of and interest in the welfare of the Community" were regarded "as a part of a participating owner's local residence background." *Id.* The Commission treats local residence and civic involvement as a single, unified comparative factor. *Sorenson*, 6 FCC Rcd at 1953 (citing *Waters*, 91 FCC 2d at 1262-63); *see also Rebecca L. Boedker*, 6 FCC Rcd 2557, 2558-59 (1991), *aff'd by judgment*, 961 F.2d 963 (D.C. Cir. 1992). *Compare Waters*, 88 FCC 2d 1204, 1208-10 (Rev. Bd. 1981) (participation in civic affairs considered as part of an integrated principal's local residence background) *with FM Broadcast Assignments*, 101 FCC 2d 638, 645 n.6 (1985) ("[e]qual weight is given to local residence and minority ownership. Past participation in civic affairs and broadcast experience are accorded less weight than either local residence or minority ownership"). Hence, it is the *combination* of local residence and civic involvement that is of equal significance to minority participation. *Great Lakes Broadcasting, Inc.*, 8 FCC Rcd 4007, 4009 (1993); *Harry S. McMurray*, 8 FCC Rcd 3168, 3175 (Rev. Bd. 1993), *recon. dismissed*, FCC 93R-35,

released July 28, 1993; *Goodlettsville Broadcasting Co., Inc.*, 8 FCC Rcd 57, 62 (Rev. Bd. 1992), *rev. denied*, FCC 93-364, released August 3, 1993. We thus conclude that the ALJ did not neglect to credit Kulisky's civic activities nor did he improperly elevate Gilford's minority enhancement in concluding that the latter outweighed Kulisky's residence enhancement, which by definition included her civic record.

9. The comparative hearing process requires a careful "weighing of all comparative factors in light of the Commission's policies and the application of those policies to the facts and circumstances of the case." *Waters*, 91 FCC 2d at 1266. *See also Policy Statement*, 1 FCC 2d at 393 ("The hearing and decision process is inherently complex, and the subject does not lend itself to precise categorization or to the clear making of precedent. The various factors cannot be assigned absolute values . . ."); *Debra D. Carrigan*, 100 FCC 2d 721, 740 (Rev. Bd. 1985) (Separate Statement) ("In comparative cases, relevant factors 'are all to be weighed, all at once, all with an eye towards the public interest. Nothing is removed from the scales until the balance is struck'") (quoting *Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503, 507 n.16 (D.C. Cir. 1982)) (subsequent history omitted). This evaluation is especially exacting where the proposals are nearly equivalent under the standard comparative criteria. *See Radio Jonesboro*, 100 FCC 2d at 948 (although disparity between applicants is slight, "it is nevertheless incumbent upon us to determine, based upon our standard comparative criteria, which applicant will better serve the public interest . . . even 'a slight difference may be decisive when greater differences do not exist'") (quoting *Sacramento Broadcasters v. FCC*, 236 F.2d 689, 693 (D.C. Cir. 1956)); *WCVQ, Inc.*, 7 FCC Rcd 4849, 4854-55 n.15 (Rev. Bd. 1992) (same); *accord Reexamination of Policy Statement*, 7 FCC Rcd at 2665; *Broadcast Lotteries*, 4 FCC Rcd 2256, 2259 (1989).

10. The Commission's recent *Great Lakes Broadcasting, Inc.* is particularly instructive to our consideration of the Kulisky exceptions. There the Commission denied review of the Board's decision comparing two 100% quantitative proposals where one applicant, Luipold, possessed long-term service area residence combined with civic involvement and broadcast experience, and another applicant, Huron, received credit for minority status and future local residence. 7 FCC Rcd 1829, *recon. denied*, 7 FCC Rcd 6548 (Rev. Bd. 1992). The Commission approved the conclusion that Luipold's combined enhancements outweighed Huron's, clarifying that:

> the credit due Luipold under the unified factor is not "maximum" because Mrs. Luipold lives within the proposed station's service area, not within the actual community of license. However, the diminishment is very slight. *See Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1262-63 (1982) (subsequent history omitted) (credit for residence and civic activities in the service area "closely follows" credit for residence and civic activities in the principal community); *see also* 7 FCC Rcd at 1830 ¶ 12. Thus the credit due Luipold under the unified factor is only marginally less than the credit due Huron for minority ownership. Huron's promise to move to the community of license is worth only slight credit and does little to increase any differential in qualitative enhancements that exists, especially in light of the fact that Luipold herself will continue to live in the service area.

8 FCC Rcd at 4009. Although Luipold's credit under the unified factor was thus "marginally less" than that received by Huron for its principal's minority status, Luipold's "slight" additional credit received for broadcast experience, unmatched by any further credit to Huron, was found sufficient to tip the balance of the comparative scales in Luipold's favor. *Id.*

11. At first glance, *Great Lakes* appears to support Kulisky's position: that the service area resident with civic involvement and broadcast experience prevails over the non-resident minority who proposes to relocate to the principal community. However, in that case, Luipold's "slight" preference for broadcast experience was sufficient to overcome the comparative deficit resulting from her residence enhancement being "marginally less" than Huron's minority preference. *Id.* In contrast, we find under the specific and unique facts of the instant proceeding that Kulisky's broadcast experience is not of sufficient consequence to tip the comparative scales in her favor. Under the *Policy Statement*, past broadcast experience is deemed to be of minor significance since it "generally confers only an initial advantage" on new licensees, and its emphasis might serve to "discourage qualified newcomers to broadcasting." 1 FCC 2d at 396.

> [G]iven the minor importance of broadcast experience among enhancement elements, *Policy Statement, supra*, 1 FCC 2d at 396, 5 RR 2d at 1910, even maximum credit translates into only a minor or slight preference, lest qualified newcomers be discouraged from entering the field.

Northern Sun Corp., 100 FCC 2d 889, 892 (Rev. Bd. 1985) (subsequent history omitted).

12. Kulisky's limited broadcast experience, *see supra* para. 3, is minimal in comparison to Luipold's two decades of hands-on production work for local broadcast outlets. While Kulisky's broadcast experience deserves some modicum of enhancement credit, we perceive that credit to be very modest. Thus, although we concede that Kulisky and Gilford's comparative proposals are virtually even under established standards, we affirm the ALJ's determination that Kulisky's meager advantage under the broadcast experience criterion is insufficient to make up the difference between Gilford's maximum minority enhancement and Kulisky's somewhat reduced preference under the unified factor. In sum, because Kulisky's eight year residence credit is somewhat diminished due to the fact that it is not in the community of license and because this shortfall is not made up for by a more impressive record of civic participation in the community of license, the applicant earns less than the maximum credit for its residence background which, in other circumstances, would normally equate with a minority preference. The advantage Gilford thus enjoys for its significant minority preference is not overcome by the additional but lesser factor of Kulisky's modest record of broadcast experience. Hence, under the unique circumstances of this case, the applicant with the single, significant and undiminished preference is preferred. We therefore uphold the *I.D.'s* ultimate conclusion that, on the particular facts here presented, grant of Gilford's application would best serve the public interest: the benefits to be realized from Gilford's minority ownership in enhancing broadcast diversity are greater than those predicted to flow from Kulisky's established familiarity with the service area and her modest broadcast experience. *Compare*

Goodlettsville, 8 FCC Rcd at 62 (applicant with advantages for 51% minority composition and 51% broadcast experience prevails over opponent with advantage under unified factor) *and Lorraine Walker Arms*, 6 FCC Rcd 5586, 5588 (Rev. Bd. 1991) (minority applicant preferred over opponent with small preferences for local residence, civic activities, and broadcast experience) *with Opportunity Broadcasting of Shreveport*, 7 FCC Rcd 3382, 3383 (Rev. Bd. 1992) (applicant with advantage for local familiarity prevails over minority applicant where the former received a substantial advantage under the broadcast experience criterion based on its "impressive management and ownership records" whereas the minority applicant offered "minimal" post-filing broadcast experience), *rev. denied and remanded on other grounds*, 8 FCC Rcd 4348 (1993) *and Frank Digesu, Sr.*, 7 FCC Rcd 837, 841 (Rev. Bd.) (applicant whose unified local residence-civic activities preference is offset by opponent's minority status wins due to its superior broadcast experience and greater female composition), *remanded on other grounds*, 7 FCC Rcd 5459 (1992); *see also McMurray*, 8 FCC Rcd at 3175 (credits for minority and six years local residence with some civic activities are equal and superior broadcast experience "tips the balance" in minority's favor).[1]

13. Having affirmed the ALJ's resolution of the standard comparative issue in Gilford's favor, we next address the remaining exceptions of Kulisky and Haskins challenging the grant of Gilford's application. They assert that the ALJ erred in crediting Gilford's integration proposal because: (1) Vera Gilford has not demonstrated that she will effectuate her proposal in light of her continuing ownership and involvement in two other businesses; and (2) Gilford proposes to operate the station on an automated basis, with no studio or production staff, and offering only promotions, commercials, and public service announcements for local programming. Kulisky Exceptions at 10-17; Haskins Exceptions at 3-9. The exceptors further maintain that the ALJ erred in declining to enlarge the hearing issues to explore Gilford's financial qualifications in view of: (1) revisions made to its financing letter; (2) failure to list Ms. Gilford's guarantee of a $50,000 loan to her business on her personal balance sheet; and (3) her balance sheet's lack of sufficient liquid assets to meet projected prosecution expenses. Kulisky Exceptions at 17; Haskins Exceptions at 17-19. We will examine each of these exceptions in turn.

14. *Effectuation.* The *I.D.* found that Vera Gilford, a resident of Miami, Florida, is the owner and operator of two on-going businesses: Pete's Fountain and Bar, Inc., where she works about 30 hours per week, and a sole law practice specializing in tax and entertainment law, to which she devotes 15 hours per week. *I.D.*, ¶ ¶ 19-21. Ms. Gilford proposes to retain Pete's as an absentee owner in the event she receives the Tavernier construction permit and to continue to spend five hours per month on the concern handling monthly accounting and tax reports. *Id.* at ¶ 20; Gilford Exh. 3 at 1. Her sister, Velma Eason, who has served as the bar's general manager since 1989, will take over Ms. Gilford's day-to-day duties. Gilford Exh. 3 at 1. Besides Vera Gilford, Pete's employs two full-time and four part-time workers. *I.D.* ¶ 20. Ms. Gilford intends to close the law practice, which she has been "phasing out" since June, 1991, prior to commencing operations under program test authority. *Id.* at ¶ 21; Gilford Exh. 3 at 2. The ALJ found these plans persuasive of her intent and ability to effectuate her integration proposal. *I.D.*, ¶ 38. Kulisky and Haskins argue that Pete's lenders may require Ms. Gilford's continuing presence at the bar; that it is unlikely that Gilford's sister manages the facility in view of Gilford's continuing employment there; and that it is unbelievable that Gilford would give up her only sources of income to manage the radio station. These assertions are speculative, without evidentiary support, and fail to point to any error on the part of the Presiding Judge.

15. An applicant who, like Gilford, seeks full-time integration credit must set forth its integration proposal "in some specific detail." *Pentecostal Revival Association, Inc.*, 1 FCC Rcd 842, 842 (Rev. Bd. 1986) (emphasis omitted), *rev. denied*, 2 FCC Rcd 6068 (1987), *aff'd*, No. 87-1653 (D.C. Cir. April 5, 1988). It must:

> set forth a specific credible plan for accommodating [its] outside interests with [its] plan for full-time integration. . . . Such a showing is necessary because the 'very existence' of outside interests renders an applicant's commitment questionable. *Blancett Broadcasting Co.*, 17 FCC 2d 227, 230 (Rev. Bd. 1969).

Naguabo Broadcasting Co., 6 FCC Rcd 4879, 4880 (1991), *modified on other grounds*, 7 FCC Rcd 1696 (1992); *followed in Kevin Potter*, 7 FCC Rcd 4342 (1992). Ms. Gilford pledged to leave Miami, to turn over the bulk of her responsibilities for the operation of the bar to her sister, already the bar's manager, and to discontinue altogether her part-time law practice. We agree with the Presiding Judge that Gilford's plan to retain Pete's meets the Commission's standards for a specific and credible plan accommodating her continuing activities with the full-time integration proposal. *Opportunity*, 7 FCC Rcd at 3385. *Compare Fresno FM Limited Partnership*, 7 FCC Rcd 4339, 4339 (1992) (integration proposal approved where principal retaining advertising agency will reduce his involvement to 5 hours per week and his duties will be handled by 3 experienced employees); *McMurray*, 8 FCC Rcd at 3174 (integration proposal of principal retaining production company credited where he proposed to curtail his involvement to 5 hours per week and demonstrated his ability to accommodate the continuing interest through tested arrangements with another company and plans to hire additional personnel to perform his remaining duties); *with Naguabo*, 6 FCC Rcd at 4880 (applicant failed to meet burden of proof that it will effectuate its integration pro-

[1] We note but need not reach Haskins and Gilford's exceptions to the award of auxiliary power credit to Kulisky. Haskins Exceptions at 23-34; Gilford Exceptions at 6. *See Barry Skidelsky*, 7 FCC Rcd 1392 (Rev. Bd. 1992) (Board need not decide questions not relevant to its decision) (subsequent history omitted). Kulisky's opponents argue that she did not budget for the necessary equipment to implement the proposal nor did she possess any knowledge as to what it would cost. *See Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925, 931 (Rev. Bd. 1991) ("every applicant has the burden of proof under the standard comparative issue, and must convincingly support each component element thereof") (quoting *Anchor Broadcasting*, 5 FCC Rcd 2432, 2435 (Rev. Bd. 1990)), *modified on other grounds and remanded*, 8 FCC Rcd 4520 (1993); *cf. Athens Broadcasting Co., Inc.*, 17 FCC 2d 452, 461-62 (Rev. Bd. 1969) (auxiliary power proposal disregarded as comparative upgrade where applicant failed to budget for auxiliary power equipment prior to hearing designation).

posal where principal would retain 2 local businesses and he made only general promises to curtail his business activities and to hire new employees); *Gloria Bell Byrd*, 7 FCC Rcd 7976, 7981-82 (Rev. Bd. 1992) (no integration credit to principal who proposed only to "curtail" involvement in other businesses "to the extent necessary" to work full time at the radio station). Similarly, we discern no reason to doubt that Gilford will close her law practice. *See Barry Skidelsky*, 7 FCC Rcd 1, 9 (Rev. Bd. 1992) (crediting integration proposal of attorney proposing to close his law practice in order to manage radio station) (subsequent history omitted).

16. *Programming/Staffing.* Although Gilford proposes an automated operation, it will produce and air local public service announcements responsive to community needs, in addition to promotions and advertising spots. One of its four full-time employees will be assigned responsibility for local production tasks, in addition to his or her other duties, which will be performed in a studio co-located with the station's office space. *I.D.*, ¶ ¶ 24, 37. We perceive no legal or factual basis, and the exceptors have provided us with none, to withhold integration credit to Gilford in light of this proposal. *See Threshold Communications*, 7 FCC Rcd 4554, 4556 (Rev. Bd. 1992). Moreover, Kulisky and Haskins have neither requested the addition of specialized programming or staffing issues to the proceeding nor raised a *prima facie* question concerning the ability of Gilford to effectuate its operations as planned. *See Annette B. Godwin*, 8 FCC Rcd 4098, 4099 (Rev. Bd. 1993), *recon. denied*, FCC 93R-37, released August 6, 1993; *Pepper Schultz*, 58 RR 2d 434, 438 & n.8 (Rev. Bd. 1985) (and cases cited therein). Although Gilford may have proposed a marginal operation, it is not facially unreasonable or "inherently improbable" in view of marketplace realities, *Pepper Schultz*, 103 FCC 2d 1052, 1055 n.5 (Rev. Bd. 1986) (subsequent history omitted), nor does it appear to be in derogation of Commission rules and policies. *See Policy Statement*, 1 FCC 2d at 397-98; *see generally Carrigan*, 100 FCC 2d at 738; *Helen Broadcasters, Inc.*, 7 FCC Rcd 2501, 2503 (Rev. Bd.), *rev. denied*, 7 FCC Rcd 6844 (1992).

17. *Financial Qualifications.* We uphold also the ALJ's refusal to add financial qualifications issues against Gilford. *Memorandum Opinion and Order*, FCC 92M-671, released June 15, 1992. In response to a motion to enlarge filed by Kulisky on February 19, 1992, Gilford demonstrated that the subsequent revisions to her financing letter from CVC Capital Corporation were minor adjustments accommodating evolving SBA requirements and that at no time did Gilford's reasonable assurance of funding lapse. Gilford Opposition at 3-4 & Exh. 1 (Declaration of Joerg G. Klebe) at 1-2; *see Salt City Communications, Inc.*, 8 FCC Rcd 683, 683 n.1 (1993). Moreover, it does not appear that Ms. Gilford's failure to include her guarantee of a $50,000 business loan on her balance sheet undermined that assurance. Before filing the application, Ms. Gilford and CVC's Joerg Klebe engaged in "extensive discussions" regarding her background and credentials, the proposal and business plan, and its likelihood of success. Klebe Declaration at 2-6; Gilford Reply Exceptions at 5-6. Moreover, CVC's decision to lend was not exclusively based on Vera Gilford's financial wherewithal, but on the estimated value of the Tavernier facility and the promotion of minority ownership of broadcast outlets, the MESBIC's *raison d etre*. *See Welch Communications, Inc.*, 8 FCC Rcd 1285, 1286 (1993); *Short Broadcasting Co., Inc.*, FCC 93R-40, adopted August 10, 1993; *Lynn Broadcasting*, 7 FCC Rcd 8563, 8567 n.10 (Rev. Bd. 1992); *see also Salt City*, 8 FCC Rcd at 685. Finally, because Gilford pays its prosecution expenses on an ongoing basis and there are no indicia that her payments are in arrears, Ms. Gilford's alleged lack of liquid assets sufficient to meet such expenses would, if true, prove inconsequential. *Weyburn Broadcasting Limited Partnership v. FCC*, 984 F.2d 1220, 1228-29 (D.C. Cir. 1993); *see also Lynn*, 7 FCC Rcd at 8568 (and cases cited therein).

18. *Miscellaneous.* Gilford filed on July 7, 1993, a motion styled "Petition for Special Relief" alleging that Haskins or Kulisky was responsible for the "repeated harassment by suspicious persons" of Vera Gilford consisting of telephone calls and a visit by a purportedly phony job applicant to Pete's Fountain and Bar. Gilford Petition at 1. Admitting that there are insufficient grounds for a motion to reopen the record or to enlarge the issues, Gilford asks the Board: (1) to order the perpetrator to cease and desist the conduct; (2) to confirm such conduct is disqualifying; (3) to furnish copies of the petition directly to Haskins and Kulisky; and (4) to order them to personally respond to the petition. *Id.* at 7-8. In oppositions filed July 13 and 19, 1993, Gilford's opponents term the petition "speculative" and "bizarre." We agree. Gilford has not shown that the perpetrator of the conduct is a party to this proceeding or that such conduct would in any event be disqualifying. The petition will therefore be dismissed.

19. ACCORDINGLY, IT IS ORDERED, That the reformation of exceptions filed by Gilford Broadcasting Company on July 28, 1992 IS ACCEPTED and that the motion to strike or reform filed by Linda U. Kulisky on July 23, 1992, IS DISMISSED as moot; that the motion to strike portion of Kulisky's reply exceptions filed by Gilford Broadcasting Company on August 10, 1992, IS GRANTED; and that the Petition for Special Relief filed by Gilford Broadcasting Company on July 7, 1993, IS DISMISSED.

20. IT IS FURTHER ORDERED, That the application of Gilford Broadcasting Company (File No. BPH-901025MF) for a construction permit for a new FM station on Channel 245A at Tavernier, Florida IS GRANTED, and that the applications of Linda U. Kulisky (File No. BPH-901024MD) and Lynda F. Haskins (File No. BPH-901025ME) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL
Concurring in part; dissenting in part

In view of the Commission's latest interpretation of its 1965 *Comparative Policy Statement* in the case of *Ronald Sorenson*, 6 FCC Rcd 1952, 1952-53 (1991), that "[t]he Board erred in treating local residence and civic activities as separate enhancement factors," and its discussion therein

of *Radio Jonesboro*, 100 FCC 2d 941, 947 (1985),[2] I cannot but accord with my colleagues' recitation found in paragraph 8, *ante*.

Where I vigorously depart from the majority is in its award of a 100% full-time ownership/management "integration" credit to Vera Gilford (d/b/a Gilford Broadcasting Co.). The record shows that:

> Vera Gilford, a resident of Miami, Florida, is the owner and operator of two on-going businesses: Pete's Fountain and Bar, Inc., where she works about 30 hours per week, and a sole law practice specializing in tax and entertainment law, to which she devotes 15 hours per week. *I.D.*, ¶ ¶ 19-21. Ms. Gilford proposes to retain Pete's as an absentee owner in the event she receives the Tavernier construction permit and to continue to spend five hours per month on the concern handling monthly accounting and tax reports. *Id.* at ¶ 20; Gilford Exh. 3 at 1. Her sister, who currently serves as the bar's general manager, will take over Ms. Gilford's day-to-day duties. Besides Vera Gilford, Pete's employs two full-time and four part-time workers. Ms. Gilford intends to close the law practice, which she has been "phasing out" since June 1991, prior to commencing operations under program test authority.

Ante, para. 14. But the record also discloses that Vera Gilford has, what to her, is a substantial investment in, and income from, Pete's Fountain and Bar, Inc., to wit[3]:

- o Pete's is a Sub-Chapter S Corporation solely owned by Vera Gilford since December, 1988.
- o $9-month 1990 net income: $ 25,281.77
- o Pete's total assets: $ 102,898.27
- o Pete's total liabilities: $ 90,578.61
- o Total stockholder equity: $ 12,319.66

After an *en passant* reference in paragraph 15, *ante*, to the controlling case of *Blancett Broadcasting Co.*, 17 FCC 2d 227, 230 (Rev. Bd. 1969)(emphasis added), the majority proceeds to blithely ignore the sagacious premise of *Blancett's* holding that:

> *the very existence* of ... other [business] interests renders questionable [integration] commitments in the absence of an additional showing by the applicant of the reliability of its integration proposal in order to support the preference sought.

Though all of the *Blancett* applicant principals had also promised to reduce their involvement in existing business interests, the Board there refused to award them even the 25% *part-time* integration credit each principal sought. Until recently, the *Blancett* principle was applied with reasonable tautness. *See, e.g., Naguabo Broadcasting Co.*, 6 FCC Rcd 4879, 4880 (1991)(quoting *Blancett* and denying credit to applicant, despite principal's vow to turn management functions of retained business over to others). *See also, e.g., Pleasure Island Broadcasting*, 6 FCC Rcd 4163, 4165 (Rev. Bd. 1991); *Leininger-Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987), *review denied*, 4 FCC Rcd 1181 (1988); *Ft. Collins Telecasters*, 103 FCC 2d 978, 985-86 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1780 (1987). Indeed, as recently as our decision in *Gloria Bell Byrd*, 7 FCC Rcd 7976, 7981-83 (Rev. Bd. 1992), my majority colleagues correctly applied the *Blancett* principle and denied integration credit to an applicant, notwithstanding her sworn pledge to reduce her oversight of another business interest and to delegate her proprietary chores to others. In the instant decision, my colleagues offer no principled distinction between the grant of integration credit to Gilford and the denial in the precedent cited hereinabove; they simply accept, without much cogent explanation, Gilford's bare offer to reduce her oversight of Pete's, Inc. from her current 30 hours per week to 5 hours per month, notwithstanding her substantial investment, income and 100% ownership retention of Pete's.[4]

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[2] As the majority observes, in *FM Broadcast Assignments*, 101 FCC 2d 638, 645 n.6 (1985), the Commission had appeared to interpret the 1965 *Policy Statement* as had the Board in its own prior decisions in *Radio Jonesboro* and *Sorenson*, by there stating:

> Equal weight is given to local residence and minority ownership. Past participation in civic affairs and broadcast experience are accorded less weight than either local residence or minority ownership. [Miscitation to *Radio Jonesboro* omitted.]

Accord Swan Broadcasting Ltd., 6 FCC Rcd 17, 20-21 (Rev. Bd. 1991) ("civic activities ... accorded less significance than local residence," citing *Radio Jonesboro), aff'd in pertinent part and remanded on other grounds*, 8 FCC Rcd 4208, 4210 (1993)(longer "local residence" offset by competitor's greater "civic activities"); *McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269, 7273 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 2347 (1991). Under the Commission's *Sorenson* interpretation of the *Policy Statement*, as we are now apparently given to understand, it makes no substantive difference whether an applicant principal has merely 2(+) years of local residence and no history of civic involvement or 20(+) years of civically active local residence, as compared to minority ownership, the latter being "equal" in weight to "local residence." *Radio Jonesboro*, 100 FCC 2d at 945. That *Sorenson* interpretation plays decisionally in the instant proceeding.

[3] This data is derived from Gilford's Opposition To Motion To Enlarge Issues (Exh. 7; Balance Sheet of Sept. 30, 1990), filed March 5, 1992.

[4] As to Gilford's law practice, the Board has accepted an unequivocal pledge to wholly terminate a practice, *see, e.g., Renee Marie Kramer*, 5 FCC Rcd 563 (Rev. Bd. 1990), *review denied*, 5 FCC Rcd 5349 (1990), *aff'd per judgment sub nom. Joyner v. FCC*, 946 F.2d 1565 (1991)(Table), just as we regularly credit other pledges to wholly divest of any other business interest, absent some anticipatory showing to the contrary. Pledges to terminate completely a business interest are, relatively speaking, much easier to police. It is where an applicant proposes to *retain*, but *reduce oversight* of, a significant outside interest that the precedent bridles. *See Blancett*, and its progeny. *Compare Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583 (Rev. Bd.)(Texas banker retains bank ownership and officerships, but promises to "diminish" oversight) *with id.*, at 599-604 (dissenting statement)(subsequent history omitted). But no sooner was the ink dry on the court's memorandum affirming the agency's award of the banker's dispositive integration credit than the banker, reportedly "on 'two career paths' and the broadcast business took more time than he had to devote to

I must concede to having pontificated over this selfsame matter in my Statement Concurring *Dubitante* in *Kevin Potter*, 6 FCC Rcd 7278, 7281 (Rev. Bd. 1991); and in cases prior to *Potter*, *see e.g.*, *Kennelwood Broadcasting Co., Inc.*, 6 FCC 1350, 1354 (Rev. Bd. 1991)(separate statement); and in cases subsequent to *Potter*. *See, e.g., Lynn Broadcasting*, 8 FCC Rcd 8563, 8570 (Rev. Bd. 1992)(concurring statement); *Helen Broadcasters, Inc.*, 7 FCC Rcd 2501, 2504 (Rev. Bd. 1992)(concurring *dubitante)* (Helen, Georgia applicant would retain residences and business offices in two *other* cities as well). I further acknowledge that, thus far, these pontifications have had little effect. *See, e.g., Kevin Potter*, 7 FCC Rcd 4342 (1992) (*aff'g* Board majority's award of integration credit);[5] *Helen Broadcasters, Inc.*, 7 FCC Rcd 6844 (1992)(same); *Kennelwood Broadcasting Co., Inc.*, 7 FCC Rcd 520 (1992), *recon. denied*, 7 FCC 2d 4580 (1992)(same). But having recognized in my concurring statement in *Potter* that the Board has helped turn the *Blancett* principle into a purely *ex visceribus verborum* judgment, and admitting that some of my views on this routinely decisional issue may not be entirely shared by others at the Commission, a dissent here would seem difficult to justify.

Still, because the Board majority fails to distinguish Gilford's award of integration credit from the denial of the same credit in *Blancett* and its line of contrary cases, most recently *Gloria Bell Byrd*, or else engages in what I find to be non-distinguishing "distinctions,"[6] I must decline to lengthen the trail of "integration" mush, though again not with some empathy for my inconstant colleagues. *See Potter*, 6 FCC Rcd at 7281 (statement concurring *dubitante)*.

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it," peddled the station for a $12(+) million profit. *Central Texas Broadcasting Co., Ltd.*, ASSIGNOR, 64 RR 2d 332, 333 (Vid. Sys. Div. 1987). The Texas banker's maneuver would have been impeded somewhat, had the Commission had in effect the 3-yr. retention rule it proposes in *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, FCC 93-363, released August 12, 1993.

[5] Intending no disrespect in the slightest, it is ironic that the majority here obliquely relies upon *Kevin Potter, see ante* paragraph 15, when it just weeks ago pointed out the curious chronological history of that very case in *Gifford Orion Broadcasting*, 8 FCC Rcd 3577, 3579 n.18 (Rev. Bd. 1993).

Therein, the Board noted that while the Commission's *Kevin Potter* (*aff'g* the Board's award of Potter's integration credit) was *adopted* on June 25, 1992 and *released* on July 9, 1992, *see* 7 FCC Rcd at 4342, the Commission had before it at that precise moment a settlement agreement previously *filed* on May 22, 1992 in which Potter himself *withdrew* his solemn integration pledge. And that, notwithstanding the Commission's July 9, 1992 *affirmation* of Potter's integration credit, Potter was *relieved* of that *just-affirmed* credit by *Order* of July 20, 1992. *See* FCC 921-065 (OGC). It is assumed naturally that, when affirming the Board's *Kevin Potter* on June 25, 1992, the full Commission was unaware of Potter's pending May 22, 1992 proposal to *withdraw* that same integration pledge; in fact, it may *yet* be unaware, since the *Order*, taken under delegated authority, which relieved Potter of his pledge, for reasons not fully explained, is not printed in the *FCC Record*, for reasons entirely unexplained. So much for bare parol pledges to "diminish oversight" of another significant business interest, to delegate that oversight function to non-owner employees, and to integrate *full-time* into the station currently sought. "I say its spinach, and I say the hell with it." (E. B. White, *New Yorker* carton caption).

[6] As suggested in the preceding footnote, and comparing cases where integration credit has been *granted* to a principal with a significant outside business interest with those cases where the same credit has been *denied*, both lines of cases are invariably reduced to the identical factor: The applicant merely says "I will let Mr. or Ms. watch the store." Sometimes the Board majority believes the applicant; and sometimes it doesn't. But the majority just flip-flops from case to case, making no objective distinctions, legal or factual. In that regard, if the " *additional showing*" requirement of *Blancett* is considered to be satisfied by the simple declaration to let "X" (identity *known*, as in this case, or *unknown* such as in *Kevin Potter)* superintend the significant outside business interest, then the *Blancett* test is *no* test at all. Every one of our similarly situated applicants says *that*. Thus, our variegated decisions teeter precariously on an arbitrary guess as to which applicant *will* "diminish" oversight of the ongoing outside business interest, and which applicant will *not*. Who can know, since nobody can predict the future vicissitudes of business, or which "X" may stay, leave or need assistance and/or watching. This seems a manifestly unsound basis on which to award, or not award, valuable spectrum space.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-638

In re Applications of	
HEIDI DAMSKY	File No. BPH-880816MW
WEDA, LTD.	File No. BPH-880816NR
HOMEWOOD PARTNERS, INC.	File No. BPH-880816NU

For Construction Permit for
New FM Station, Channel 247A,
Homewood, Alabama

MEMORANDUM OPINION AND ORDER

Adopted: August 12, 1993; Released: August 31, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. A comparative hearing was held on the above-captioned applications proposing a new FM station for Homewood, Alabama. In the *Initial Decision*, 7 FCC Rcd 5244 (1992), (I.D.), Administrative Law Judge Joseph Chachkin (ALJ) selected Homewood Partners, Inc. (HPI) as the superior comparative applicant. He found HPI to be a "strong" and "clear" comparative winner -- HPI having received 100% ownership participation credit enhanced by minority ownership, long-term local residence, and significant civic participation. I.D., at 5261 ¶ ¶ 199, 200, 202. WEDA, Ltd. finished a distant second. *Id.* ¶ 202. The ALJ also concluded that Heidi Damsky was not financially qualified. *Id.* at 5258 ¶ 180. Our examination of the record, however, reveals that the parties' exceptions, a petition to reopen the record and enlarge issues by WEDA, and other pleadings raise substantial and material questions about HPI's candor, as set out below. We, therefore, remand the case for further hearing and the preparation of a Supplemental Initial Decision. *See Frank Digesu, Jr.*, 7 FCC Rcd 5459, 5461 (1992).

THE EXCEPTIONS

2. *BACKGROUND:* Willie Huff, Deborah Huff, and Adrienne Lee, d/b/a Homewood Partners filed their application on August 16, 1988. HPI Exh. 1. A petition to amend this application was filed on March 8, 1991 which substituted a two-tiered corporation (HPI) for the general partnership. The three original partners, Willie and Deborah Huff and Adrienne Lee, remained as the voting stockholders and two other individuals, Franklin Hopkins and W. James Ellison, were added to the application as non-voting stockholders. Each of the five stockholders holds a 20% equity interest in HPI, I.D., 7 FCC Rcd at 5255 ¶ ¶ 149-150, and each must contribute $15,000 to help partially finance the venture.

3. Heidi Damsky's Exceptions, at pp. 4-17, assert that the ALJ erred in denying her petition to enlarge issues filed October 28, 1991, for a complete exploration into the many misrepresentations and inconsistencies in the evidence presented by HPI. *Id.* p. 4. In essence, Damsky argues that contemporaneous 1988 documents obtained through discovery, depositions of HPI's principals, and other evidence unearthed during the comparative hearing indicate that Hopkins and Ellison each had a financial interest in the HPI application from the time it was filed in August 1988 and that such interests were concealed from the Commission until the change of ownership structure reported in the March 1991 amendment. *Id.*, pp. 15-17.

4. To support its argument, Damsky relies initially on a series of checks that show that Ellison and Hopkins made financial contributions to the Homewood partners in August of 1988. Damsky specifically alleges that:

> The first of these checks was written by Franklin P. Hopkins on August 28, 1988, to the order of Homewood Partners. While the only available copy of the check had the dollar amount redacted, Mr. Hopkins testified that he thought the check was in the sum of $1200 (Hear. Tr. 973, 986-91). The check was marked in the lower left-hand corner "Ownership 20% of Homewood Partners". Mr. Hopkins wrote a second check on December 7, 1990 which, he believed, was in the amount of $400 (F. 47; Hear. Tr. 996-97; Damsky Exh. 5, pg. 3). On August 31, 1988, Prof. W. James Ellison wrote a check in favor of HPI, marking the check in the lower left-hand corner "20% Interest Radio". Prof. Ellison also remembered the amount of that check being $1200 (Hear. Tr. 1000). Still another check was written by Prof. Ellison on December 28, 1988 to the order of Homewood Partners. Ellison's hearing testimony indicated that the second check was written to HPI, but that he could not remember the amount of that check (Damsky Ex. 5, pgs. 1-2; Hear. Tr. 1001).

Damsky Exceptions at 6-7. Damsky adds that, notwithstanding the specific notations on the checks "ownership 20% Homewood Partners" and "20% Interest Radio," both Hopkins and Ellison insisted in their comparative hearing testimony that "the payments evidenced by the checks were mere loans." *Id.* citing Tr. 972-73, 976, 986-91, 1003, 1031.

5. Damsky next points to another contemporaneous document, a letter dated August 12, 1988, from the partnerships' local attorney, which letter indicated that courtesy copies of the letter had been sent to the three general partners and to Hopkins and Ellison. Damsky Exceptions at 7 citing Tr. 655 and 668. Moreover, Adrienne Lee, an original partner, in deposition testimony, had identified Hopkins and Ellison among "the partners" present at a meeting held in the fall of 1988. Damsky Exceptions at 7. According to Damsky, Lee later changed her testimony at the comparative hearing in the following exchange:

> A. [Lee]: What's here [in Lee's Deposition] is, the partners, Willie Huff, Deborah Huff, Marvin Stewart, Franklin Hopkins and Bill Ellison and I.
>
> Q. Okay. Well, are you denying that you said that?

> A. No. I'm not denying that I said that, but I'm saying that that is not what I should have answered or what is right.
>
> JUDGE CHACHKIN: What is right?
>
> THE WITNESS: I said, the partners, and they were not partners. We were not partners.
>
> JUDGE CHACHKIN: Were they present at the meeting?
>
> THE WITNESS: Yes, they were present.

Damsky Exceptions at 9 citing Tr. 884-86.

6. Damsky notes that, at the hearing on the comparative issue, HPI produced "ledger sheets" (*i.e.*, HPI Ex. 9) kept by Willie Huff, one of the original partners from the inception of the partnership, which sheets showed that the contributions of Ellison and Hopkins were treated as "loans". Exceptions at 9 citing Tr. 775-84. Damsky argues that, on their face, the ledger sheets "were highly suspect" because:

> they showed that on August 15, 1988, Willie and Deborah Huff allegedly purchased a two-thirds interest in HPI for $2,000; and that on September 8, 1988, Adrienne Lee purchased a one-third interest also for $2,000. The partnership agreement on the other hand indicated that the partnership was to be capitalized at $6000, contributed equally by the three general partners. HPI Ex. 1, p. A5.

Exceptions at 9. Damsky further notes that Willie Huff testified at the hearing that he had kept computerized records when the partnership contributions were made in 1988 that would substantiate the accuracy of the ledger sheets. Exceptions at 10 citing Tr. 777-87, 828-29, 845-46. Damsky requested and received "a series of floppy disks containing these records." Exceptions at 10 citing Tr. 779-81.

7. Thereafter, on October 28, 1991, Damsky filed a petition to add misrepresentation issues against HPI. Damsky alleged in this petition, and continues to allege on appeal, that the computer records "were totally inconsistent with the hand written ledgers." Exceptions at 11. Damsky reports that HPI's ledgers:

> purported to show that on August 15, 1988 Willie and Deborah Huff made a cash contribution marked "capital" in the sum of $2000 for a 66.7% interest in HPI; that on September 8, 1988, Adrienne Lee made a $2000 contribution marked "capital" for a 33.3% interest; that on August 28, 1988, Franklin Hopkins made a $1200 contribution for a "note payable" identified as a "loan"; and that on September 2, 1988, W. James Ellison made a $1200 contribution, also identified as a "note payable" and a "loan."

Id., at 11. Damsky insists that HPI's computer records "raised grave questions" concerning the veracity of Huff's testimony about the ledger sheets because the computer records showed "notes payable" of only $409 and "'capital stock' outstanding in the sum of $6,000, which is consistent with the concept that there were five equal 20% investors, each of whom contributed $1200 to the venture." *Id.* Damsky contends that "if Mr. Huff had been treating the Ellison and Hopkins contributions as 'loans' and 'notes payable', the January 1989 computerized records should have shown at least $2400 in notes payable. They did not." *Id.* at 12.

8. Damsky's final exception on this point relates to an evidentiary ruling made at the November 4, 1991 hearing session. *Id.* at 16. Prior to the session, Damsky exchanged the written testimony of Edwin F. Alford, the former chief document examiner for the U.S. Secret Service, who had examined the originals of the ledgers. Alford's statement showed that there had been erasures in the items shown on the ledger sheets and that some of these erasures related directly to the entries that purported to show that the contributions of Ellison and Hopkins were "loans." At the hearing, Damsky offered Mr. Alford as a witness, but the ALJ refused (Tr. 1177-1198) to allow Alford to submit his written exhibit and his testimony. Damsky contends this was "egregious error." *Id.*

9. Later, by *Memorandum Opinion and Order*, FCC 92M-131, released January 30, 1992, the ALJ denied Damsky's petition filed October 28, 1991 seeking misrepresentation issues against HPI, because, (like an earlier petitioner), Damsky "had failed to establish that payments made by Hopkins and Ellison in 1988 represented a payment for a partnership interest, rather than loans, as urged by HPI." *Order* at ¶ 3. The ALJ observed that:

> Damsky urges that evidence produced subsequent to the September 1991 hearing session indicates that the records of the partnership showed that the payments were treated as capital, rather than loans. The evidence now relied on is data contained on Huff's backup computer disks. Damsky contends that these disk entries are inconsistent with Huff's handwritten ledgers.

Id. The ALJ stated however that:

> The evidence which Damsky relies on in support of a basic issue was offered as an exhibit and fully explored at the November 4 hearing session. *See* Tr. 1199-1221. Damsky's exhibit which contains [computer] entries beginning in 1989 was rejected as not relevant to the 1988 contemporaneous ledger data. *See* Tr. 1220-1221. For the same reason, the evidence relied on by Damsky does not support addition of the requested basic issues. The issues will not be added based on speculation, innuendo, and surmise.

Id.

10. *DISCUSSION:* As we recently pointed out in *Artichoke Broadcasting Corp.*, 8 FCC Rcd 4531, 4534 at ¶ ¶ 18 and 21 (Rev. Bd. 1993), petitions seeking misrepresentation issues must be supported with specific allegations of fact sufficient to support the action requested. Such allegations of fact must raise a *prima facie* question and, except for those of which official notice may be taken, shall be supported by affidavits of a person or persons having personal knowledge thereof. *See* 47 CFR §1.229(d), and 47 USC §309(d); *see also Barry Skidelsky*, 7 FCC Rcd 1, 6 (Rev. Bd. 1992) (subsequent history omitted). A hearing issue will be added if "a substantial and material question of fact" is presented by the petition, the application, the pleadings filed, and other matters which can be officially noticed. 47 USC 309(d)(2). And the Court has held that:

> ... whether there exists, by reason of a valid petition or otherwise, "a substantial and material question of fact" requiring a hearing - the Commission may, and indeed must, weigh against the allegations of the petition the other evidence before it, including opposing affidavits filed pursuant to § 309(d)(1). On the basis of *all* those materials it must decide whether the ultimate question of fact placed in issue (in this case, the question of conscious misrepresentation ...) is a "substantial" one - *i.e.*, whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for.

Citizens for Jazz on WRVR Inc. v. FCC, 775 F.2d 392, 395 (D.C. Cir. 1985) (emphasis in original).

11. In essence, the Court's *WRVR* decision requires the Board to determine whether the "totality of the evidence" presented by all sides to the dispute "arouses a sufficient doubt" about HPI's candor regarding the nature of the contributions of Ellison and Hopkins so that "further inquiry is called for." Both before the ALJ, and the Board, HPI recognizes that the *WRVR* decision is legally controlling here. *See* HPI Reply Br. at 18. However, it argues that the existing factual record establishes that the 1988 contributions by the two individuals were treated as loans to the partnership, *see* Reply Br. at 5-17, and that Damsky has not justified a further hearing about HPI's candor.

12. After reviewing the record in the light shed by Damsky's Exceptions, and HPI's Reply, the Board has concluded that further inquiry is warranted. The specific notations on the 1988 checks do not support HPI's loan thesis. And, although HPI's ledger sheets appear to reflect the loan thesis, Damsky has proffered expert testimony about "erasures related directly to the entries purported to show that the contributions of Ellison and Hopkins were loans." On the other hand, Willie Huff, HPI's own witness, testified that his computer records would corroborate the accuracy of the ledger sheets. Damsky has also proffered a print-out of the computer records which does not reflect the loans from Ellison and Hopkins shown on the ledger sheets but does show more capital stock than is shown on the ledger sheets. This is consistent with Damsky's theory that the $1200 contributions were not loans but represented payment for a 20% interest in the partnership. In sum, Lee's deposition testimony, the available documentary evidence, including the specific notations on the original checks, the unexplained erasures in the ledger entries, the notation on local counsel's letter, and HPI's failure to corroborate its witnesses' oral testimony with its own computer records raise a substantial and material question of fact requiring a further hearing on appropriate issues.

13. The *Memorandum Opinion and Order*, FCC 92M-131, *supra*, which denied Damsky's petition to enlarge issues is hereby reversed. *See Frank Digesu, Jr., supra.* And since the facts regarding the notations on the checks, the erasures in the ledger sheets, and the nature and contents of the computer records are all within the peculiar knowledge of the applicant and its principals, the burdens of proceeding and proof properly rest upon HPI. *See Barry Skidelsky*, 7 FCC Rcd at 11 n.11, citing *Elyria-Lorain Broadcasting Co.*, 6 RR 2d 191 (1965).

PETITION TO REOPEN THE RECORD AND ENLARGE ISSUES

14. The *Hearing Designation Order*, 6 FCC Rcd 788 (1991), specified a financial qualifications issue against HPI. To meet the issue, HPI filed a petition for leave to amend on March 8, 1991, which included a copy of a loan application to the Alabama Small Business Investment Company, Inc. (ASBIC). Appended to the loan application as Exhibit 2 was a Financial Statement of Adrienne F. Lee, as of December 31, 1990. HPI estimated that it would need $325,855 for construction and operation costs, $250,000 of which would be financed by ASBIC. To finance the remainder, each of the stockholders, including Ms. Lee, would contribute $15,000. After granting the petition for leave to amend, the ALJ resolved the financial issue in HPI's favor and granted summary judgment. *Order*, FCC 91M-2923, released September 25, 1991, and FCC 91M-1918, released June 18, 1991.

15. On September 18, 1992, following the release of the I.D., WEDA, the third applicant in this case, filed a petition to reopen the record and enlarge the issues, which HPI opposed on October 8, 1992. WEDA filed a reply on October 27, 1992, and on December 21, 1992 HPI sought leave to file supplemental information. Supported by some eight official Federal and State documents, WEDA's petition establishes that HPI in its previous financial filings with both the ASBIC and FCC failed to disclose:

> (a) An Internal Revenue Service tax lien dated October 7, 1987 for $2,767.46 against Adrienne Lee and her husband.
>
> (b) A Judgment by the Alabama County District Court dated April 11, 1988 for $4,045.87 against Adrienne F. Lee.
>
> (c) A Judgment by the Alabama County District Court dated October 10, 1985 for $1,433.46 against Adrienne F. Lee.

Petition, Att. 3, pp. 1-8.

16. In an opposition, HPI submits a seven page declaration by Ms. Lee, Exhibit 1, to which were attached seven additional official documents, Attachment B-D. In her declaration, Ms. Lee acknowledged:

> (a) The 1987 IRS lien involved the failure to pay 1983 and 1984 income taxes, after extensions had been sought. This resulted from a disagreement with her husband "over whose account the money should come from," "not because we did not have to the money to pay it." Exh. 1, p. 2. These taxes were paid and the lien was released on September 5, 1990. *Id.* at 3.
>
> (b) In March of 1991 the IRS also imposed a *second* lien for $3,262.92 for non-payment of 1985 and 1986 income taxes, after extension had been sought. This was attributable to her husband's failure to pay the taxes which were later paid and on May 22, 1991, the IRS issued a release. *Id.*
>
> (c) The 1988 Judgment was attributable to another disagreement with her husband over who should pay and not because they were unable to make the payments. Ms. Lee believed that in 1988 she had fully satisfied the judgment. In March of 1992 when her salary was garnished, she was unable to find docu-

mentation that she had paid the remaining $1600; thereafter, she paid the balance due and a release was executed on September 8, 1992. *Id.* at 3-6.

(d) The 1985 Judgment was attributable to a real estate partnership between Ms. Lee and a Virginia Elliot, who is now deceased. Ms. Lee believed that she had paid that bill in 1986, has begun an inquiry, and "if it still has not been paid, she will see to it that it is paid." *Id.* at 6-7.

17. HPI urges that Ms. Lee's personal and family financial matters have absolutely no relevance to its financial qualification and that those matters have been fully resolved by her declaration and attached documentation. HPI argues there is no nexus between her private financial matters and its financial qualifications. HPI also relies on the declaration of the manager of the ASBIC'(Exhibit 2), who states that knowledge of those matters would not have affected his determination to issue the loan commitment letter to HPI. Finally, it points to the declaration of Willie Huff (Exhibit 3), affirming that Ms. Lee has already made her contribution. Opposition, pp. 2-3.

18. WEDA replies that under 26 USC § 6081 of the IRS Code, no extension for filing a tax return can be granted for more than six months, and that by her own admission, Ms. Lee's returns for 1983 through 1986 were each filed more than a year late. WEDA Reply at 5-6. WEDA argues "that in making contributions to [the application] while not satisfying income tax obligations, Ms. Lee was juggling her legal obligation to IRS with those necessary to fund a valuable federal privilege -- a broadcast licensee." *Id.* at 5. It argues that in *Las Americas Communications, Inc.*, 101 FCC 2d 728 (Rev. Bd. 1983), the Board held that substantial and material questions of fact were presented even though the federal tax obligation had been subsequently satisfied. *Id.* at 6.

19. *DISCUSSION:* We need not decide whether this case is controlled by *Las Americas*, as WEDA claims, because our more recent remand in *Weyburn Broadcasting, L.P.*, 5 FCC Rcd 1972 (Rev. Bd. 1990), dictates that a remand hearing is in order here. A further hearing on financial and candor issues was required in *Weyburn* because of the Court's decision in *WRVR, supra*, and *Southwestern Operating Co. v. FCC*, 351 F.2d 834, 838 (D.C. Cir. 1965), which held that: Congress has prescribed a Section 309(e) trial-type hearing when "the accumulation of the documentary representations and affidavits [reach] a dimension wherein the truth [is] becoming obscured, rather than revealed by the mounting papers." The subsequent failure to conduct a full trial-type hearing on all the substantial and material questions presented resulted in a Court remand. *See Weyburn Broadcasting L.P. v. FCC*, 984 F.2d 1220 (D.C. Cir. 1993).

20. Substantial and material questions of fact are presented as to whether HPI has been candid and forthcoming in financial pleadings filed with the Commission, most particularly, that Ms. Lee's financial statement, which was filed with both ASBIC and the Commission, did not list any of the liabilities revealed by the two outstanding judgments and the IRS lien. The significance of the nondisclosures continues to be debated by the parties and cannot be resolved on the basis of the pleadings. WEDA states that the judgments and liens "cast substantial doubt upon Ms. Lee's ability to make the $15,000 stock subscription contribution, which is a necessary component of [HPI's] financial certification. Petition at 11. HPI, in turn, submits a cryptic declaration by Willie Huff, who states without any further documentation that: "Each of the five shareholders...has made the required contribution of $15,000 for the purchase of corporate stock." Exhibit 3, p. 1. And, the ASBIC manager's declaration that knowledge of Ms. Lee's "personal financial matters" would have had no impact whatsoever on his determination concerning HPI's worthiness of an ASBIC loan does not eliminate the need for further hearing because as he notes earlier the ASBIC loan must be complemented by "another $75,000 to be contributed by the five shareholders ($15,000 by each shareholder through their purchase of corporate stock)." Exhibit 2, p. 2. Further, even if she subsequently paid her full $15,000 share, the liens have the Board wondering whether she had the net liquid assets to do so at the time the applicant certified to its financial qualifications. In sum, as in *Southwestern Operating Corp., supra*, the truth has been obscured rather than revealed by the conflicting declarations and attached documents so that a further trial-type hearing has been justified on the issues sought by WEDA. Here, as in *Weyburn Broadcasting, supra*, 984 F.2d at 1234, these financial and candor issues may be "closely related" to the candor and ownership issues discussed in the previous section. As noted with respect to the earlier issues, HPI will bear both the burden of proceeding and the burden of proof because the basic facts are within the peculiar knowledge of the applicant and Ms. Lee. *See* para. 13, *supra*.

21. ACCORDINGLY IT IS ORDERED, That the Motion to Accept Reply Pleading Nunc Pro Tunc, filed on October 27, 1992, by WEDA, LTD. IS GRANTED; that the Petition to Reopen the Record and Enlarge Issues, filed on September 18, 1992, as supplemented on September 21 and 24, 1992, by WEDA, LTD. IS GRANTED; that the Contingent Discovery Motion, filed September 18, 1992, by WEDA, LTD. IS REFERRED to the Administrative Law Judge;[1] that the Motion for Leave to File Supplemental Information, filed December 21, 1992, by Homewood Partners, Inc. IS GRANTED; and that this proceeding is remanded to the Administrative Law Judge for further hearing and issuance of a Supplemental Initial Decision on the following issues:

(a) To determine whether in its original application Homewood Partners, Inc. misrepresented facts or was lacking in candor when it certified that it was a general partnership composed of three general partners;

(b) In the event the evidence adduced under (a), *supra*, shows that Homewood Partners, Inc. was, on the day of filing of its application, a general partnership composed of three persons, to determine whether two additional persons subsequently acquired interests in Homewood Partners, Inc. and to deter-

[1] Section 1.243 of the Commission's rules, 47 CFR § 1.243, confers the initial authority to rule upon questions of evidence upon the presiding ALJ, not the Board. *See also Comparative Hearing Process Proposals*, 6 FCC Rcd 157, 161 ¶ 30 (1990).

mine whether Homewood Partners, Inc. violated Section 1.65 of the Commission's Rules and Regulations by failing to report the acquisition of these interests by such persons;

(c) To determine whether the principals of Homewood Partners, Inc. misrepresented facts or were lacking in candor when they testified at the hearing that the contributions of Franklin Hopkins and W. James Ellison were "loans" and were not, in fact, payments for interests held in Homewood Partners, Inc.;

(d) To determine whether Homewood Partners, Inc. was financially qualified at the time that it certified its financial qualifications;

(e) To determine whether Homewood Partners, Inc. made misrepresentations and/or lacked candor in pleadings filed before the Commission when it asserted that it was financially qualified; and,

(f) To determine whether Homewood Partners, Inc. violated Section 1.65 of the Commission's Rules when it failed to disclose the existence of federal tax liens and other judgments against Homewood Partners, Inc.'s shareholder Adrienne Lee.

(g) To determine, in light of the above issues, whether Homewood Partners, Inc. is fit to be a Commission licensee.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 19, 1993

Released: August 19, 1993

In Reply Refer To:
7220-M/1700C3

Mr. Eliot J. Greenwald
Fisher, Wayland, Cooper and Leader
1255 Twenty-third Street, N.W.
Suite 800
Washington, D.C. 20037-1170

Dear Mr. Greenwald:

This letter is in response to your correspondence of August 12, 1993, concerning the September 15, 1993, lottery date for the Interactive Video and Data Service (IVDS). Your letter was referred to me because IVDS is administered by the Special Services Division of the Private Radio Bureau.

In your letter, you note that the Federal Communications Commission will conduct lotteries to resolve mutually exclusive applications for IVDS frequencies in nine service areas on September 15, 1993. *See* Public Notice, DA 93-935 (July 23, 1993). In addition, you note that the lottery date of September 15, 1993, is on the eve of the religious holiday of Rosh Hashanah. Thus, you state that the requirement for applicants selected by the lottery (tentative selectees) to file the Form 574 within two business days of the release of a public notice listing the tentative selectees may create a conflict with this occasion. Such a conflict, you conclude, would present a hardship for certain IVDS applicants.

Because the IVDS requirement to file the Form 574 within two business days commences with the release of a public notice listing the tentative selectees, a conflict with the religious holiday of Rosh Hashanah could only transpire if the public notice is released on the eve of or during the holiday. Accordingly, in recognition of the merits of your letter, the Bureau will release a public notice listing the tentative selectees for nine IVDS service areas on Monday, September 20, 1993. The timing of the release of the public notice shall not affect any previously announced procedural or substantive requirement, policy or event concerning IVDS. *See generally Report and Order*, GEN Docket 91-2, 7 FCC Rcd 1630 (1992).

Sincerely,

Robert H. McNamara
Chief, Special Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Waiver of Section 76.64 for
Yankee Microwave, Inc.

ORDER

Adopted: August 18, 1993; Released: August 18, 1993

By the Chief, Mass Media Bureau:

1. On March 11, 1993, the Commission adopted a *Report and Order*[1] in this proceeding to implement the mandatory television broadcast signal carriage ("must-carry") and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act").[2] On May 26, 1993, the Commission adopted an *Order* denying a Request for Stay submitted by Yankee Microwave, Inc. ("Yankee").[3] In subsequent pleadings, Yankee requests reconsideration of that *Order*, or alternatively, the immediate grant of its petition for reconsideration.[4] Yankee requests immediate relief on behalf of its cable system customers from the provision of Section 76.64(b)(2) regarding an exception to retransmission consent. Alternatively, Yankee requests a revision of Section 76.64(b)(2) to apply to microwave carriers, as well as satellite carriers of a superstation signal. In addition, petitions for reconsideration filed by Newhouse Broadcasting Corporation ("Newhouse") and the National Cable Television Association ("NCTA") and an Opposition filed by the Association of Independent Television Stations ("INTV") have also requested that Section 76.64(b)(2) be revised.[5] No party has filed comments opposing Yankee's requested relief.

2. Section 76.64(b)(2) of the retransmission consent rules states that a commercial broadcast signal may be retransmitted without express authority of the originating station if the cable system obtains the signal from a satellite carrier and the originating station was a superstation on May 1, 1991 (the "superstation exception").[6] Yankee contends that this rule unfairly provides an exception from the retransmission consent requirements for superstations delivered via satellite, but not the same signals delivered by microwave or other video distribution systems. In particular, Yankee, a microwave deliverer of such signals, claims that cable systems have already notified it of their intent to switch to satellite delivery of WSBK-TV, Boston, Massachusetts, a superstation, in order to avoid the need to obtain retransmission consent from the originating superstation, to Yankee's competitive disadvantage. Yankee, in supplemental pleadings, has provided copies of letters from various cable systems which support this claim, in so far as these systems state that they will discontinue microwave delivery of the superstation and change to satellite delivery, because satellite delivery will not require retransmission consent.

3. We are persuaded by the evidence submitted by Yankee that it is threatened with imminent loss of a large percentage of its video microwave business as a result of our current interpretation of the superstation exception. Accordingly, on our own motion, we are waiving Section 76.64(b)(2) of our rules for 120 days from the release of this *Order* to enable the cable systems listed in paragraph 4 below to carry superstation WSBK-TV via delivery by Yankee. Our action is intended to provide the Commission opportunity to fully consider the specific issues raised by the petitions for reconsideration described above. It also is intended to provide Yankee with an opportunity to secure retransmission consent from the affected superstation, WSBK-TV, which we note has not objected to Yankee's proposal.[7] We emphasize that this waiver is limited both in duration and scope and is being granted in response to a specific showing of imminent harm on the part of Yankee and in the absence of any opposition on the part of the affected station.

4. Accordingly, IT IS ORDERED that pursuant to Section 4(i) and 4(j) of the Communications Act of 1934, as amended, the provisions of Section 76.64(b)(2) of the Commission's Rules are waived, for a period of 120 days from the date of this *Order* for the following cable systems' carriage of Superstation WSBK-TV, Boston, Massachusetts, via Yankee Microwave facilities: A-R Cablevision in Bangor, Lewiston, and Mechanics Falls, Maine; State Cable in Augusta, Livermore, Norway and Rumford, Maine, Conway and Littleton, New Hampshire; Casco Cable in Brunswick, Maine; Better Cable in Waterville, Maine; Helicon Cablevision in St. Johnsbury, Vermont; and Warner Cable in Berlin and Claremont, New Hampshire.

5. For further information on this proceeding, contact Elizabeth W. Beaty, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[1] *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965 (1993). *See also, Clarification Order*, 8 FCC Rcd 4142 (1993), and *Order*, 58 FR 40366 (July 28, 1993).

[2] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§4-6, 106 Stat. 1460 (1992).

[3] Yankee filed its Request for Stay on May 3, 1993 and a supplement thereto on May 6, 1993. The *Order* also denied a Petition of the National Cable Television Association for a Stay Pending Reconsideration or, Alternatively, Pending Review. *Order*, 8 FCC Rcd 2939 (1993).

[4] Yankee filed a Petition for Reconsideration of Denial of Request for Stay on June 14, 1993 and also filed a Supplement to its Petition for Emergency Reconsideration and Request for Modification of Rule. Yankee subsequently filed additional supplements to these petitions on June 18, 1993 and July 30, 1993.

[5] The specific requests for a revision of this rule will be addressed by the Commission in a separate order, along with other issues raised by the parties in the petitions for reconsideration.

[6] *See* 47 C.F.R. § 76.64(b)(2).

[7] In comments filed in this proceeding, WSBK-TV states that it "... does not oppose Yankee's petition to the extent that it only exempts out-of-market cable systems from retransmission consent."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rochester Telephone Corporation Tariff F.C.C. No. 1 — Transmittal Nos. 191 and 204

ORDER

Adopted: August 18, 1993; Released: August 18, 1993

By the Acting Chief, Common Carrier Bureau:

1. On May 14, 1993, Rochester Telephone Corporation (Rochester) filed Transmittal No. 191 proposing, *inter alia*, 18, 36, and 60 month term discount plans for its DS3 service. *See* Rochester Tariff F.C.C. No. 1, Proposed Section 7.2.9(D)(6). Rochester's term discount plans will offer discounts off its month-to-month rates for channel termination, facility termination, and facility mileage for DS3 service. *Id.*

2. On June 1, 1993, Sprint Communications Company L.P. (Sprint) filed a petition for rejection or, in the alternative, for suspension and investigation of Transmittal No. 191. On the same date, MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal No. 191; Rochester filed a reply on June 9, 1993. Transmittal No. 191 and Transmittal No. 204 (*see infra* note 2) are scheduled to take effect on August 19, 1993.

3. Sprint asserts that the discounts under Rochester's proposed DS3 term discount plans, in relation to the discounts under Rochester's DS1 term discount plans, constitute discriminatory volume discounts favoring the largest interexchange carrier. Sprint Petition at 2. Also, Sprint maintains that Rochester should not be permitted to introduce discriminatory term discounts because the Commission has initiated an inquiry into the application of volume and term discounts in the expanded interconnection proceeding.[1] Further, Sprint avers that term discounts for DS1 and DS3 services should be uniform to avoid the use of term discounts as a subterfuge for volume discounts. *Id.* at 1-2.[2]

4. In response, Rochester asserts that the Commission has never held that term discount plans offered for DS3 services must mirror term discount plans offered for DS1 services. Rochester Reply at 2. Also, Rochester avers that the Commission has expressly rejected claims that term discounts for high capacity special access services discriminate against competitors or smaller interexchange carriers.[3] In addition, Rochester argues that prohibiting the differentials in its term discount rates for DS1 and DS3 services will not remedy any perceived rate advantage which AT&T Communications may have over its smaller competitors because the primary competitive access provider in Rochester's service territory already offers DS3 service at rates which are lower than Rochester's proposed 60 month term discount rate. *Id.* at 4.

5. The Common Carrier Bureau has reviewed Transmittal No. 191 and all the associated pleadings. We conclude that no compelling argument has been presented that the tariff provisions, as revised, are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

6. Accordingly, IT IS ORDERED that the petition to reject, or in the alternative, to suspend and investigate Rochester Telephone Corporation Tariff F.C.C. No. 1, Transmittal No. 191, filed by Sprint Communications Company L.P., IS DENIED.

7. IT IS FURTHER ORDERED that the petition to reject Rochester Telephone Corporation Tariff F.C.C. No. 1, Transmittal No. 191, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Bureau Chief
Common Carrier Bureau

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[1] *Id.* at 4 (*citing* Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order*)).

[2] Also, Sprint and MCI contend that Rochester's proposed 60 month DS3 channel termination rate, as initially filed, does not cover Rochester's costs of providing the DS3 channel termination service in violation of the Commission's price cap rules for new services. *Id.* at 3 (*citing* In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990)); MCI Petition at 3. In response to Sprint and MCI's contentions, on August 16, 1993, Rochester filed Transmittal No. 204 to increase its 60 month channel termination rate to a level which exceeds its direct costs and submitted accompanying cost support, as required by Sections 61.49(g)(2) and (h) of the Rules. 47 C.F.R. Sections 61.49(g)(2) and (h).

[3] *Id.* at 2 (*citing Expanded Interconnection Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 20, 1993

TRANSPORT RATE STRUCTURE AND PRICING
CC Docket No. 91-213

WAIVERS TO BE ENTERTAINED FROM NON-TIER 1 LECS REGARDING IMPLEMENTATION OF INITIAL RESTRUCTURED TRANSPORT TARIFFS

In the First Memorandum Opinion and Order on Reconsideration, the Commission exempted non-Tier 1 local exchange carriers (LECs) that have not received *bona fide* requests for direct-trunked transport from implementing the interim transport rate structure adopted in *Transport Rate Structure and Pricing*, CC Docket No. 91-213, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006 (1992), *recon.*, First Memorandum Opinion and Order on Reconsideration, FCC 93-366, ¶ 60 (released July 21, 1993), *recon.*, Second Memorandum Opinion and Order on Reconsideration, FCC 93-403 (released August 18, 1993). The Commission, however, retained its requirement that such LECs file tariffs for entrance facilities on a flat-rate basis.

The Common Carrier Bureau will entertain waiver requests from non-Tier 1 LECs that have not received *bona fide* requests for direct-trunked transport and that wish to establish a single, bundled rate element encompassing the tandem-switched transport and interconnection charge elements. If such LECs provide entrance facilities and will be filing tariff revisions to offer entrance facilities on a flat-rate basis, their tariff filings may include a single, bundled rate element encompassing the tandem-switched transport and interconnection charge elements and calculated on a residual basis, pending disposition of their waiver requests. Any non-Tier 1 LEC that does not provide entrance facilities and has not received a *bona fide* request need only file a waiver request and need not file tariff revisions on September 1, 1993, pending disposition of its waiver request.

Such waiver requests should be filed on September 1, 1993. Parties wishing to file comments on or oppositions to such waiver requests should consolidate such comments or oppositions with their petitions to reject or suspend and investigate the tariffs. The LECs may reply to any such comments or oppositions in their replies to such petitions. For further information, contact Barbara Esbin, (202) 632-6917, Tariff Division, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-213

In the Matter of

Local Exchange Carrier Switched
Local Transport Restructure
Tariffs

Motion for Extension of Time

ORDER

Adopted: August 18, 1993; Released: August 19, 1993

By the Deputy Chief, Tariff Division:

1. On August 6, 1993, Sprint Communications Company (Sprint) filed a motion for extension of time to file petitions seeking suspension or rejection of the local exchange carrier (LEC) switched local transport restructure tariffs.[1] The tariffs are scheduled to be filed September 1, 1993, on 90 days' notice.

2. Sprint states that because of the critical role these rates play in interexchange carriers' (IXC) costs, all IXCs will wish to give the tariffs the closest possible scrutiny to assure that they are reasonable, that they comport with the Commission's rate-setting guidelines in CC Docket No. 91-213 and that they satisfy the policy goals set out by the Commission in that proceeding. Sprint claims that the review process for these tariffs will be further complicated by the fact that the LECs do not have to file all required information simultaneously with the tariffs themselves. Sprint therefore requests an 18-day extension of time, to October 15, 1993, for filing petitions to suspend or reject the local transport tariffs. Under Section 1.773(a)(2)(iii) of the rules, 47 C.F.R. § 1.773 (a)(2)(iii), petitions against these tariffs would be otherwise due on September 27, 1993.

3. Sprint asserts that in seeking this extension of time, it is not asking to delay the December 1 effective date of the tariffs. Comments in support of Sprint's motion for extension of time were filed by CompTel and MCI on August 10, 1993 and August 16, 1993, respectively.

4. The Common Carrier Bureau has reviewed Sprint's request for extension of time and has determined that good cause has been shown to grant all interested parties additional time, until October 7, 1993, to file petitions seeking suspension or rejection of the switched local transport restructure tariffs. The filing carriers are also given additional time, until October 25, 1993, to reply to those petitions.

5. THEREFORE, IT IS ORDERED that Sprint Communications Company's motion for extension of time IS GRANTED to the extent specified herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Mary L. Brown
Deputy Chief, Tariff Division
Common Carrier Bureau

[1] *See* Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 91-213, 7 FCC Rcd 7006 (Com. Car. Bur. 1992); Memorandum Opinion and Order on Reconsideration, FCC 93-366 (rel. July 21, 1993); Second Memorandum Opinion and Order on Reconsideration, FCC 93-403 (rel. August 18, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-119

In the Matter of

Amendment of Section 73.202(b), RM-8215
Table of Allotments,
FM Broadcast Stations.
(Hali'imaile, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 10, 1993; Released: August 27, 1993

By the Chief, Allocations Branch:

1. At the request of RC Broadcasting, Inc., ("petitioner"), permittee of Station KPMW(FM), Hali'imaile, Hawaii, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 2947 (1993), proposing the substitution of Channel 288C for Channel 288A at Hali'imaile, Hawaii, and modification of Station KPMW(FM)'s construction permit to specify operation on the higher class channel. Petitioner filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 288C for Channel 288A at Hali'imaile, Hawaii, as it would provide the community with a wide coverage area FM service.

3. Channel 288C can be allotted to Hali'imaile in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.9 kilometers (8 miles) southwest.[1] In accordance with Section 1.420(g) of the Commission's Rules, we will modify petitioner's construction permit for Station KPMW(FM) to specify operation on channel 288C at Hali'imaile, Hawaii.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 12, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Hali'imaile, Hawaii	288C

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station KPMW(FM), Hali'imaile, Hawaii, IS MODIFIED, to specify operation on Channel 288C in lieu of Channel 288A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, RC Broadcasting, Inc., permittee of Station KPMW(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 288C at Hali'imaile are North Latitude 20-49-24 and West Longitude 156-27-27.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-239

In the Matter of

Amendment of Section 73.202(b) RM-8313
Table of Allotments,
FM Broadcast Stations.
(Quincy, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 13, 1993; Released: August 27, 1993

Comment Date: October 18, 1993
Reply Comment Date: November 2, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Quincy Community Radio ("petitioner"), proposing the allotment of Channel 240C3 at Quincy, Washington, as its second local FM transmission service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 240C3 at Quincy, Washington, since it could provide the community with its second local FM transmission service. An engineering analysis has determined that Channel 240C3 can be allotted at Quincy with a site restriction of 3.5 kilometers (2.2 miles) northeast.[1] Since Quincy is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been requested.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Quincy, Washington	244A	244A, 240C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 18, 1993,** and reply comments on or before **November 2, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia, Esq.
Pepper & Corazzini
1776 K Street, N.W., Ste. 200
Washington, D.C. 20006
(Counsel for Petitioner)

6. IT IS ORDERED, That the Secretary Shall Send by Certified Mail, Return Receipt Requested, a copy of this Notice of Proposed Rule Making to:

Basin Street Broadcasting
P.O. Box 819
Chelan, Washington 98816
(Licensee of Station KULE-FM)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presenta-

[1] The coordinates for Channel 240C3 at Quincy are North Latitude 47-15-13 and West Longitude 119-48-58. Petitioner proposed coordinates North Latitude 47-19-13 and West Longitude 119-48-00 with a site restriction of 10.3 kilometers (6.4 miles) northeast. However, the Commission generally does not protect a petitioner's desired transmitter site for a new allotment if a less restrictive site is available, as there is no guarantee that the petitioner ultimately will become the licensee. Therefore, we will not consider petitioner's site and advance a less restrictive site for the allotment of Channel 240C3 at Quincy.

We note that the proposed coordinates for Channel 240C3 at Quincy are short-spaced to Station KULE-FM, Channel 240A, Ephrata, Washington. However, the license for Station KULE-FM was modified to specify operation on Channel 222C2 in the context of MM Docket No. 87-326. *See* 4 FCC Rcd 307 (1989). On June 7, 1993, Basin Street Broadcasting ("BSB"), licensee of Station KULE-FM, filed a Form 301 application (File No. BPH-930607IF) to upgrade to Channel 222C2 facilities at Ephrata. Therefore, the issuance of a license for Channel 240C3 may be withheld until Station KULE-FM is licensed on Channel 222C2 at the site specified in its application for construction permit. We will serve BSB with a copy of this *Notice*.

tion is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-117

In the Matter of

Amendment of Section 73.202(b), RM-8214
Table of Allotments
FM Broadcast Stations.
(Kahalu'u, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 10, 1993; Released: August 27, 1993

By the Chief, Allocations Branch:

1. At the request of Brewer Broadcasting Corp. ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 2949 (1993), proposing the substitution of Channel 291C for Channel 291A at Kahalu'u, Hawaii, and modification of Station KLEO(FM)'s license to specify operation on the higher class channel. Petitioner filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 291C for Channel 291A at Kahalu'u, Hawaii, as it would provide the community with a wide coverage area FM service.

3. Channel 291C can be allotted to Kahalu'u in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 17.6 kilometers (11 miles) north of the community.[1] In accordance with Section 1.420(g) of the Commission's Rules, we will modify petitioner's license for Station KLEO(FM) to specify operation on Channel 291C at Kahalu'u, Hawaii.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 12, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Kahalu'u, Hawaii	291C

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KLEO(FM), Kahalu'u, Hawaii, IS MODIFIED, to specify operation on Channel 291C in lieu of Channel 291A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Brewer Broadcasting Corp., licensee of Station KLEO(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 291C at Kahalu'u are North Latitude 19-44-30 and West Longitude 155-57-23.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-380

In re Applications of

RIO GRANDE BROADCASTING CO.	File No. BPH-880815MV
ROBERTO PASSALACQUA	File No. BPH-880816NN
IRENE RODRIGUEZ DIAZ DE McCOMAS	File No. BPH-880816OR
UNITED BROADCASTERS COMPANY	File No. BPH-880816OW

For Construction Permit for a
New FM Station on Channel 247A
in Rio Grande, Puerto Rico

Appearances

Timothy K. Brady on behalf of Rio Grande Broadcasting Company; *Roy F. Perkins, Jr.* on behalf of Roberto Passalacqua; *Jerome S. Boros* and *Jerold L. Jacobs* on behalf of Irene Rodriguez Dias De McComas; *John L. Tierney* on behalf of United Broadcasters Company; and *James W. Shook* on behalf of the Mass Media Bureau.

DECISION

Adopted: August 19, 1993; Released: September 1, 1993

By the Review Board: MARINO (Chairman) and GREENE. Board Member BLUMENTHAL concurring.

Board Member GREENE:

1. The Review Board has before it an *Initial Decision*, 7 FCC Rcd 7682 (1992), by Administrative Law Judge Joseph P. Gonzalez (ALJ), in which he granted the construction permit application of Rio Grande Broadcasting Co. (RGB) for a new FM station at Rio Grande, Puerto Rico, and denied the mutually exclusive applications of Roberto Passalacqua (Passalacqua), Irene Rodriguez Diaz De McComas (McComas), and United Broadcasters Company (United). Passalacqua, McComas, and United filed exceptions to the *Initial Decision* and RGB filed contingent exceptions. Passalacqua also filed a petition for leave to amend the engineering portion of his application to specify a new antenna site, which is opposed by all of the other applicants but supported by the Mass Media Bureau.[1]

2. The sole issue tried was the standard comparative issue. Employing the criteria set forth in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), the ALJ selected RGB as the comparatively superior applicant. McComas was assessed a decisive diversification demerit for her husband's interest in a family-owned business holding a broadcast license which the ALJ found placed her at a comparative disadvantage with respect to the other applicants. *Initial Decision*, 7 FCC Rcd at 7686, 7690 ¶ ¶ 40-41, 71. On the integration criterion, each applicant received one hundred percent quantitative integration credit. All of the proposals were qualitatively enhanced by minority ownership; and the applicants were credited with long-term service area residence and some civic involvement for their principals. Passalacqua and United were also given credit for past broadcast experience. The decisional difference separating the applicants was a "slight advantage" given RGB because RGB's fifty-one percent owner had lived in Rio Grande, the community of license, for thirteen years prior to the filing of the applications whereas the principals of the other applicants had only long-term residences in the service area. *Id.* at 7690 ¶ 72. United, RGB, and McComas received coverage preferences over Passalacqua for superior coverages, but those preferences were very slight because their proposed service areas are already well-served. *Id.* at ¶ 72.

3. In the exceptions, the parties contend that Passalacqua should be dismissed for want of a transmitter site and that the ALJ erred in failing earlier to dismiss Passalacqua's application. Additionally, they vigorously challenge each others' quantitative integration proposals; McComas contests its diversification demerit; and the parties object to certain of the ALJ's interlocutory rulings. We have reviewed the *Initial Decision* and Passalacqua's petition for leave to amend in light of the exceptions, the record, and the responsive pleadings. We adopt the ALJ's findings and conclusions except as modified herein, but conclude that: (1) Passalacqua's application must be dismissed for lack of a viable site; (2) RGB's quantitative integration credit must be diminished to seventy-five and one-half percent, which effectively eliminates it from comparative consideration;[2] and (3) United is entitled to one hundred percent quantitative integration credit, which with qualitative enhancements, no diversification demerit, and good coverage, leaves United as the comparatively superior applicant. We do not reach the exceptions directed against McComas because she could not prevail comparatively even if the exceptions were resolved in her favor. *See Colonial Communication, Inc.*, 6 FCC Rcd 2296 (1991) ("An agency, like a court, need not decide questions which are not relevant to its decision.").[3]

[1] Both United and McComas filed requests for oral argument to which RGB filed an opposition. We will deny the requests for oral argument because it appears that oral argument would not materially assist in the resolution of the case. *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 163 (1990).

[2] *See Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5066 ¶ ¶ 17-18 (1989)(enhancement attributes considered only where there are no clear quantitative integration differences among the applicants)(subsequent history omitted).

[3] Even leaving aside the diversification demerit assessed by the ALJ, McComas clearly is comparatively behind United on virtu-

PASSALACQUA

4. The ALJ declined to dismiss or deny Passalacqua's application notwithstanding his conclusion that Passalacqua's proposed transmitter antenna site was no longer available. Instead, he directed Passalacqua to file an amendment for a new site if the applicant remained in the proceeding. *Initial Decision*, 7 FCC Rcd at 7690 ¶ ¶ 73-75. The exceptions, which were due before Passalacqua filed the petition for leave to amend, and which are mainly directed to the absence of a site, contend that Passalacqua's application must be dismissed. They challenge both the *Initial Decision* ruling affording Passalacqua an opportunity to amend and a prior interlocutory ALJ ruling concerning Passalacqua's site. The oppositions to the petition for leave to amend, in turn, argue that Passalacqua's amendment must be denied for lack of good cause as well as an absence of a showing that the amendment was necessitated by circumstances unforeseeable to the applicant. A recitation of the background history and the respective petitions and rulings will assist in understanding our disposition.

5. The *Hearing Designation Order*, 5 FCC Rcd 5442 (released September 6, 1990) (*HDO*), specified an air hazard issue against Passalacqua based on his failure to obtain a determination from the Federal Aviation Administration (FAA) that the antenna tower site would not constitute a hazard to air navigation. In response, Passalacqua filed a petition for leave to amend on October 17, 1990, to reduce the tower height by 9 meters to an overall tower height of 152 meters, or 500 feet, above ground level. In the petition, he argued that there was good cause for the amendment because it was filed within thirty days after the *HDO* was published in the *Federal Register* (55 Fed. Reg. 38,150, September 17, 1990) and would permit resolution of the issue. He further represented that the applicant had been advised informally by the FAA that a "no hazard" determination would be promptly issued in light of the height reduction. Almost immediately thereafter, however, and before the ALJ could act on the petition, counsel for Passalacqua asked the ALJ to delay action on the petition pending further amendment. *See* Letter from Passalacqua to ALJ of Nov. 1, 1990. The letter reported that the FAA had notified counsel the day after the petition had been filed, and again on October 31, 1990, that it would not issue a "no hazard" determination unless the tower height was further reduced to 123 feet.[4] Having received an opposition from McComas and no curative amendment, the ALJ denied the petition for leave to amend by *Order*, FCC 91M-518, released February 11, 1991.

6. On March 21, 1991, more than five months after the FAA notice of the need for further tower reduction, Passalacqua attempted a second curative amendment specifying as his new site a tower already proposed by McComas. *See* Petition for Leave to Amend, March 21, 1991. Passalacqua contended that the need for the site change was unforeseeable because the FAA had acted contrary to information it had earlier given the applicant and that there was good cause for the amendment. Subjoined to the petition, however, was a copy of a two-year old letter from the FAA, dated February 14, 1989, that explicitly cautioned Passalacqua that the FAA would not approve Passalacqua's originally proposed tower if it exceeded five hundred feet. The tower Passalacqua had proposed in his application was 161 meters, or approximately 528 feet. Based on the FAA letter, which pre-dated the *HDO* and warned Passalacqua that his proposal was defective, United, RGB, and McComas opposed the petition, arguing that Passalacqua had not been diligent in filing his initial curative amendment. United also contended that the latter FAA condition did not require Passalacqua to change his site because he could have simply reduced his overall tower height to 123 feet. The Mass Media Bureau filed comments, advising that the new site complied with the Commission's technical rules, and supporting the good cause claim. Passalacqua thereafter filed a motion on May 1, 1991, contending that the amendment resolved the air hazard issue and requesting summary decision. The ALJ accepted the amendment and granted summary decision in separate orders. *Order*, FCC 91M-2242, released July 23, 1991; *Order*, FCC 91M-2254, released July 24, 1991.

7. Subsequent to the close of record, on July 2, 1992, McComas filed a petition to dismiss Passalacqua's application or, alternatively, to reopen the record and add site availability, misrepresentation, and lack of candor issues. McComas supported her requested relief with a declaration under penalty of perjury from Jorge Estrada, the owner of Passalacqua's (and McComas') proposed antenna site. Estrada averred that, although he had met with Passalacqua on one occasion and agreed to allow Passalacqua to use his

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ally every distinguishable factor. On the unified local residence/civic activities factor, McComas has resided intermittently in Puerto Rico much of her life but has been a continuous resident in the service area only since 1978; and her pre-application-filing civic participation is predicated on a position she held from 1976-1981 as an aide to the Governor of Puerto Rico. There was no showing, however, that her governmental experience imparted any specific knowledge of local needs and interests, a prerequisite for enhancement credit. *See The Baltimore Radio Show, Inc.*, 4 FCC Rcd 6437, 6441 ¶ 19 (Rev. Bd. 1989) (state-wide activities having remote bearing on service area not credited); *Eugene Walton*, 7 FCC Rcd 3237, 3238 ¶ 12 (1992) (post-filing civic activities are entitled to only minor weight). In contrast, two of United's principals (fifty percent of ownership) are life-long service area residents and the remaining two have service area residence since 1969 and 1974, respectively, and all have recognizable civic enhancements, *see Initial Decision* ¶ ¶ 49, 51-52, 55, 58, thus, entitling United to a local residence preference. *See Naguabo Broadcasting Co.*, 6 FCC Rcd 4879, 4880 ¶ 9 (1991) (residence as child and adolescent and broken in time by college years diminished in significance); *Edward F. and Pamela J. Levine*, 8 FCC Rcd 2630, 2635 n.16 (Rev. Bd. 1993) (applicant preferred on unified residence/civic factor for better record of civic participation when residences equal). On the past broadcast experience factor, McComas has no experience whereas fifty percent of the United principals have lengthy past broadcast experience. In this regard, the ALJ, without explanation, denied past broadcast enhancement for one of the United principals, Josantonio Mellado. Because Mellado worked for broadcast stations during the 1970s, he is entitled to credit. *See* United Exh. 4. United also sought a preference because one of its principals is physically handicapped, but the Commission does not recognize such a preference. *See Ronald Sorenson*, 6 FCC Rcd 1952, 1954-1955 n.10 (1991).

[4] The FAA received an objection from the Plans and Programs Office, San Juan Center/Approach Control to any tower exceeding a height of 123 feet above ground. After further studies, including aircraft traffic counts, the FAA advised counsel for Passalacqua that the maximum height that it would approve was indeed 123 feet. Passalacqua's Petition for Leave to Amend, Att. C (November 1, 1990 Letter from Passalacqua to ALJ).

tower for monthly installment payments, Passalacqua had made only one payment and never again communicated with Estrada. Estrada declared that he has never authorized Passalacqua to use his tower in the absence of payments and that Passalacqua is not entitled to use his tower. In an opposition, filed August 7, 1992, Passalacqua submitted his own declaration under penalty of perjury, contradicting Estrada's claim they met only once. He maintained that Estrada had agreed for a two hundred dollar payment to allow him to use the tower in the future should his application be granted, and he submitted in support an "Amendatory Statement" that the tower will be available, signed by Estrada. Passalacqua claimed he continued to have reasonable assurance of the site because Estrada did not explicitly state in the declaration that the tower would be unavailable in the future if he were to pay rent. Passalacqua conceded he did not have or desire to have a "current" right to use the tower.

8. In her reply, filed September 4, 1992, McComas submitted a further declaration of Estrada, averring that he had never agreed to accept a single payment of two hundred dollars from Passalacqua for assuring the future availability of his site. Estrada said that the signed "Amendatory Statement" was conditioned upon a continuation of the payments, a condition he claimed had not been honored by Passalacqua. He also declared that he had not heard from Passalacqua in the wake of the pleadings and clarified that he would not do business with Passalacqua, now or in the future, because he found Passalacqua's declaration offensive. Passalacqua responded, by supplement filed November 2, 1992, that Estrada's declaration was not credible and that the purpose behind the declaration was to preclude others with whom he had agreements, including McComas, from terminating their payments. Passalacqua argued that Estrada is in the business of renting space on the tower and has made no representation that he will dispose of the tower; thus, Passalacqua contended he still had reasonable assurance of the tower site in spite of the owner's statements to the contrary. As a precaution, however, Passalacqua reported that he had found a nearby new site and included both a statement from the site owner that the site is available and a copy of another station's earlier-granted and FAA-approved application for that site.

9. In the *Initial Decision*, which was released November 27, 1992, the ALJ concluded that Passalacqua originally had reasonable assurance of Estrada's tower site in light of the "Amendatory Statement," the site was no longer available because of a misunderstanding, and Passalacqua had shown that an alternative site is available. He therefore denied McComas' petition to dismiss or add issues and ordered Passalacqua to file an amendment if he remains active in this proceeding. In response, on January 19, 1993, Passalacqua filed his petition for leave to amend his application to specify the site identified in his pleading to the ALJ. He argues that the most recent change is unforeseeable since the owner of his former site, Estrada, withdrew his permission because "of his umbrage at Passalacqua's declaration defending his [Passalacqua's] reasonable assurance." Pet. for Leave to Amend at 5. Passalacqua also argues that good cause exists for the amendment because he acted with due diligence in responding to the *Initial Decision* and because acceptance of the amendment will permit consideration of his application and maximize the number of qualified competing applicants from which a comparative choice may be made. The Bureau filed comments on the amendment, reporting that its engineering staff has analyzed the amendment and found only one technical problem, which Passalacqua remedied in a supplement filed on February 16, 1993. The Bureau further stated that good cause appears to exist because the amendment was filed in response to a directive contained in the *Initial Decision*.

10. *Discussion.* Post-designation engineering amendments will be considered only if accompanied by a showing of good cause for late filing and a demonstration that "the amendment is necessitated by events which the applicant could not reasonably have foreseen." 47 CFR 73.3522(b)(1).[5] An applicant in a comparative proceeding can amend as a matter of right within thirty days after *Federal Register* publication of the order or a summary only if the issue is first raised in the *HDO* rather than at some earlier time. 47 CFR 73.3522(b)(2). To establish good cause, the applicant must demonstrate that: it acted with due diligence; the amendment was not required by its voluntary act; no additional issues or parties would be required; the hearing process will not be disrupted; there will be no prejudice to competing applicants; and the applicant will not gain a comparative advantage. *See Erwin O'Conner*, 22 FCC 2d 140, 143 ¶ 7 (Rev. Bd. 1970).

11. In the instant case, Passalacqua first knew in February 1989 that he had problems with his site because the FAA had given him explicit notice that it would not issue a no hazard determination if his tower exceeded 152 meters or 500 feet. Passalacqua did not act on that notice but, instead, waited until thirty days after *Federal Register* publication of the hearing designation order in September 1990 to first request amendment of his application by decreasing the tower height nine meters (28 feet) to the height he thought the FAA would accept. When the FAA told him in October 1990 that this reduced height would not be approved, Passalacqua waited another five months, until March 1991, before amending to the site already proposed by another applicant in this proceeding. Passalacqua claimed good cause for the amendment tendered in October 1990 because he filed it within thirty days of the *HDO*,[6] and he claimed good cause for the March 1991 amendment because the FAA had changed its criteria for the site. But, he never explained the long delay in making his first attempt to amend his application or the five month delay after the FAA advised him that further reductions in the tower height would be needed for a no hazard determination.

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[5] The engineering portion of an application is processed outside of the hearing process; thus, amendments are disruptive to the hearing process and are not acceptable when the problems are foreseeable. *See generally Radio Lake Geneva Corp.*, 7 FCC Rcd 5586, 5588-5589 ¶ 11 (Rev. Bd. 1992) (subsequent history omitted).

[6] Because of the 1989 FAA notice of a problem with his site, he was not entitled to the benefits of 47 CFR 73.3522(b)(2) allowing amendments as a matter of right after notice in a hearing designation order. *See Radio Associates, Inc.*, 6 FCC Rcd 2094 (Rev. Bd. 1991)(amendments as of right allowed only if the issue is *first raised* in the HDO), cited with approval in Commission Brief in *Sharron Annette Haley v. FCC*, No. 91-1410 at n.8, filed August 11, 1992. He has not claimed a right to amend after the site issue was designated in the HDO.

12. Due diligence is an important element in the necessary good cause showing. To establish this, an applicant:

> must show that it acted promptly after it discovered, or it should have discovered, the potentially disqualifying deficiency. Clearly, an applicant that sits idly by, either doing nothing or pursuing a course of action that is not likely to resolve the problem expeditiously, lacks diligence.
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> [Moreover], in the absence of unusual circumstances, a delay of more than six months has been presumed to be excessive. Therefore, an applicant seeking to amend more than six months after the defect was, or should have been, discovered will have a heavy burden of establishing due diligence.

Imagists, 8 FCC Rcd 2763, 2765 ¶ ¶ 12, 14 (1993)(footnote omitted)(applicant who waited fifteen months after learning of a defect with its first site failed to show due diligence even though it promptly responded to FAA concerns about its amended site).[7] Passalacqua's unexplained wait from his notice of the FAA's initial concerns until the *HDO* was published before beginning the amendment process does not meet the due diligence requirement, and his subsequent March 1991 amendment to the Estrada site proposed by McComas, which included an additional unexplained five month delay in action, should not have been accepted by the ALJ. *See id.* at 2763-66 ¶ ¶ 5-17.

13. Because Passalacqua's earlier amendment was not supported by good cause, we need not consider whether he had good cause later to amend from the Estrada site. *See Colorado Television, Inc.*, 98 FCC 2d 513, 518 n.6 (Rev. Bd. 1984) (rejection of first site amendment requires rejection of second amendment because "the chain of good cause has long since been broken"). We note, however, that site owner Estrada had declared on July 2, 1992 that Passalacqua was not entitled to use the site and on September 4, 1992 has said that under no circumstances would Passalacqua ever be allowed to use the site. Passalacqua knew this, had allegedly even identified a new site, yet waited until January 1993 and the specific direction of the ALJ in the *Initial Decision* to amend to a new site. Passalacqua's argument that he had reasonable assurance in spite of Estrada's statements, because the tower is available to anyone who will pay the rental fee, is contrary to the record evidence for the tower owner is under no legal obligation to accept all who want access and he has unequivocally said he will not accept Passalacqua. Indeed, Passalacqua has acknowledged that he had no "current" right to the site. Affidavit ¶ 9, Opp. August 7, 1992. *See South Florida Broadcasting Co., Inc.*, 57 RR 2d 495, 500 (Rev. Bd. 1984) ("where site owner expressly conditions access to the site and those conditions are not met or unlikely to be met, it cannot be glossily claimed that one has 'reasonable assurance' of the site nonetheless."); *William F. Wallace and Anne K. Wallace*, 49 FCC 2d 1424 (Rev. Bd. 1974) (mere possibility that a site will be available is not sufficient to show reasonable assurance of a site). Good cause is not found where an applicant, who knows his application is defective, does nothing about the problem until it is noticed at the Commission. By then, it just might be too late. *See Eugene Walton*, 6 FCC Rcd 6071 (Rev. Bd. 1991) (applicant waiting ten months for action on facially deficient waiver request rather than immediately amending to a properly spaced site lacked due diligence); *Cf. Neil I. Sanders*, 102 FCC 2d 865 (Rev. Bd. 1985) (continuous procrastination warranted denial of application); *cf. also Commercial Radio Institute, Inc.*, 78 FCC 2d 1016, 1030 ¶ 20 (Rev. Bd. 1980) (change of strategy does not excuse the lack of due diligence)(subsequent history omitted).

14. Finally, Passalacqua's argument that his amendment should be accepted to maximize the number of applications from which to choose does not excuse his lack of due diligence or warrant acceptance of his most recent amendment. In *Imagists* the Commission explained (8 FCC Rcd at 2764-65 ¶ ¶ 10-11 (footnotes omitted):

> [W]e have modified our former practice of liberally accepting post-designation amendments that cure disqualifying defects, such as the loss of a transmitter site or a financial commitment. Originally concerned with promoting the broadest choice of applicants in an effort to obtain the optimum in ultimate service to the public, we have tempered this objective somewhat in view of our "responsibility to provide service to the public in the most efficient, expeditious manner possible."
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> Thus, we do not allow "applicants ... to inordinately delay the processing of applications from applicants who are willing and able to proceed with the prosecution of their applications." In our view, defective proposals disserve the public interest, even if ... any such deficiencies are remedied before the start of the evidentiary hearings. In this regard, a competing party has a valid interest in the prompt resolution of a proceeding that is prejudiced if it must consider multiple proposals from a single applicant. Indeed, any time and expense that an applicant devotes to preparing for the evidentiary hearing based on an opponent's initial proposal is forfeited if that proposal is amended. The clear waste of private and public resources that this entails is exacerbated in multiparty proceedings where a site change by one applicant affects the hearing preparations of a large pool of competing applicants. This delays service to the public even if the amendment does not require additional hearings, additional or modified issues, or the addition of new parties. Liberally permitting curative amendments further undermines our efforts to reduce the time and money devoted to our comparative

[7] The Commission further urged applicants in *Imagist* to submit curative amendments, whenever possible, no more than 30 days after they learn, or should have learned, of the deficiency requiring the amendment. It cautioned that applicants waiting more than 30 days to file a petition for leave to amend should be prepared to explain the need for additional time and to document the immediate steps taken upon learning of the deficiency.

process to the extent that it discourages future applicants from exercising the maximum possible care in formulating their proposals.

15. Passalacqua's application is not grantable in the absence of a viable site. Because he has not shown good cause for amending to a viable site, his application will be dismissed. *See Imagists, supra; see also Artichoke Broadcasting Corp.*, 8 FCC Rcd 4531, 4534 ¶ 16 (Rev. Bd. 1993); *Shoblom Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1983), *rev. denied*, FCC 84-119, released Apr. 2, 1984, *aff'd mem . sub nom. Royce International Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 995 (1985).

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16. RGB is a partnership comprised of three partners: Noe Marin, Jorge Figueroa, and Vilma Iris Arroyo. *Initial Decision*, 7 FCC Rcd at 7683 ¶ 10. Martin has a fifty-one percent equity interest in the partnership and both Figueroa and Arroyo have twenty-four and one-half percent interests, respectively. *Id.* Figueroa and Arroyo are husband and wife. Each of the partners claims integration credit for proposing to work full-time at the station in a managerial-level position: Arroyo as general manager; Marin as sales manager; and Figueroa as business manager. *Id.* at ¶ ¶ 12, 14, 16.

17. The ALJ credited all of the proposals notwithstanding that Figueroa, an attorney and an owner of two dry cleaning establishments, will retain his law practice and the two businesses. He currently spends approximately twenty hours per week on the law practice and another ten to twenty hours per week on the dry cleaning businesses. *Id.* at 7684-7685 ¶ ¶ 23-24. Figueroa is a sole practitioner and characterizes his law practice as "civil litigation," "obligations," "contracts," "wills," and "notarial services." Tr. 242. With respect to the dry cleaning businesses, Figueroa testified that he visits both daily, once in the morning to confer with his managers, and a second time in the afternoon to collect receipts; he also works at one of the establishments on Saturdays for five to six hours. *Id.* at 7684-7685 ¶ 23. RGB stated in its direct case that if its application is granted, Figueroa will: (1) reduce the time currently devoted to his law practice to Wednesday afternoons and Saturdays, *i.e.*, ten hours per week, by limiting his practice to civil matters that do not involve litigation or court appearances; and (2) eliminate the daily activity at the dry cleaning businesses, either by selling the businesses or by hiring an employee to assume his Saturday shift and turning over the daily oversight activities to one of the current employees of each business. RGB Exh. 4.[8] The ALJ's accreditation of Figueroa's proposal was premised on Figueroa's testimony that he does not anticipate spending more than two hours per week on Saturdays consulting with his managers and reviewing reports and ten hours on his law practice. 7 FCC Rcd at 7684-7685 ¶ ¶ 23-24. The ALJ concluded that the number of hours added together do not appear to present an impossible burden. *Id.*

18. Both United and McComas urge that RGB's quantitative integration credit be reduced because RGB failed to meet its burden to show how Figueroa will effectuate his proposal. United argues with respect to the law practice that the mere elimination of litigation and court appearances will not reduce Figueroa's overall time commitment by one-half because Figueroa's litigation practice is already small and includes very little litigation. United further asserts that it is contrary to the nature of a law practice to be able to limit it to no more than ten hours per week and that serving the needs of clients cannot be anticipated within such precise limitations. United also notes that, while Saturdays are one of the days Figueroa earmarked for practicing law, Saturdays are also the day Figueroa will devote time to the dry cleaning establishments. McComas adds that Figueroa has not identified the employees who will assume his duties at the businesses or shown that his plans concerning the law practice are consistent with his professional responsibilities to his clients.

19. *Discussion.* Integration credit will not be awarded where an applicant's outside employment activities cast substantial doubt on whether the proposed integration into station management is likely to be effectuated. *See generally Royce International Broadcasting*, 5 FCC Rcd 7063, 7063 ¶ 7 (1990)(subsequent history omitted). Indeed, for professionals or self-employed applicants like Figueroa, "the very existence of their other interests renders questionable their commitments in the absence of an additional showing by the applicant of the reliability of its integration proposal to support the preference sought." *Blancett Broadcasting Co.*, 17 FCC 2d 227, 230 ¶ 7 (Rev. Bd. 1969). To receive credit, an applicant must "set forth a specific credible plan for accommodating these outside interests with his plan for full-time integration." *Naguabo Broadcasting Co.*, 6 FCC Rcd at 4880 ¶ 8 (subsequent history omitted). Generalized promises to "diminish" the time spent on significant business interests are insufficient for this showing, *see Leininger-Geddes Partnership*, 2 FCC Rcd 3199, 3199 ¶ 3 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1181 (1988), as are broad general pledges to find suitable assistance. *See generally Naguabo Broadcasting Co., supra* (promise to hire additional employees if needed not sufficient); *Pleasure Island Broadcasting*, 6 FCC Rcd 4163, 4165 (Rev. Bd. 1991)(promise to reduce time at car dealership to 15 hours per week and to hire another manager not sufficient).[9]

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[8] Figueroa's dry cleaning businesses and law practice are located in Cagus, Puerto Rico, his current residence, which the record indicates is approximately forty-five minutes from Rio Grande by car (Tr. 213). He has proposed to move to Rio Grande if RGB's application is granted.

[9] The Board has previously remarked:

> [I]t is the ineluctable nature of commercial enterprise that nobody can foretell, especially several years in advance, how much time, energy or money will be "necessary" for a particular business activity, whether the future be "eureka!"or bankruptcy.

Gloria Bell Byrd, 7 FCC Rcd 7976, 7982 ¶ 20 (Rev. Bd.).

> [W]e have no way to check afterwards, and were we to accept such a promise where significant business interests remain, all comers would receive full-time credit.

Naguabo Broadcasting Co., 6 FCC Rcd 912, 924 n.63 (Rev. Bd.), *aff'd* 6 FCC Rcd 4879 (1991).

20. Here, RGB has not met its burden of establishing that Figueroa can accommodate his integration commitment with his law practice. Rather, the record is nebulous. Figueroa testified that the percentage of his time already devoted to civil litigation is limited: "could be three times a month or less," Tr. 243, and was vague as to how he would fulfill his obligations to his clients in light of the very restrictive time schedule. His testimony as translated for the transcript was: "the client would be prepared that my time as a lawyer would be closer to me and reduced, and I would refer them to other lawyers that would take care of them." Tr. 244. But Figueroa's law practice is a solo practice that is dependent on his personal attention to the needs of his clients,[10] which he has not shown can always be contained neatly within the periods of Wednesday afternoons and Saturdays. Figueroa has made the general representation that his clients must be prepared for the limits he proposes and he would refer them to other lawyers, but he has offered no showing that he has made any arrangements with his professional colleagues for handling client needs occurring outside the hours of his limited availability or that such arrangements would be satisfactory to his clients.[11] Before the ALJ and the Board can conclude that Figueroa's part-time law practice will not interfere with the effectuation of his full-time integration pledge, the applicant "must first make a showing from which such a conclusion can be drawn." *Oliver Kelley and Mary Ann Kelley*, 6 FCC Rcd 7377, 7378 ¶ 7 (Rev. Bd. 1991), *rev. denied*, 7 FCC Rcd 4239 (1992). *See Cuban-American Limited*, 5 FCC Rcd 3781, 3785 ¶ 28 (1990). The showing here, which amounts to nothing more than a request to trust him to take care of the essentials later, is insufficient for evaluating the feasibility of the proposed arrangement and the seriousness of Figueroa's intentions.[12] We recognize that several cases have turned on the number of hours an applicant has proposed to devote to the station and to outside interests where the proposal is unreasonable on its face.[13] But, merely promising to reduce a solo law practice to a number of hours that, on its face, has not previously been found to be clearly unreasonable does not meet an applicant's burden of persuasion where, as here, the feasibility of this promise cannot be evaluated from the record. *See generally Kennelwood Broadcasting Co., Inc.*, 6 FCC Rcd at 2895 ¶ 9 (aggregate work schedule, by itself, is not dispositive).[14] Figueroa's plan to continue practicing law renders his integration commitment too questionable for crediting on this record.[15]

21. Furthermore, although we do not decide whether RGB's showing concerning Figueroa's dry cleaning establishments is sufficient, by itself, to avert a similar diminution of RGB's integration credit for those businesses, their retention, the fact that Figueroa's attention to those businesses is proposed for one of the days that he represented he would also devote to his law practice, and the vague plan to rely on unspecified employees to manage them and handle the receipts or sell the businesses, tend to

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[10] This dependence on Figueroa's personal skills and attention distinguishes his situation from *Achernar Broadcasting Co.*, 5 FCC Rcd 6309, 6312 ¶ 15 (Rev. Bd. 1990), cited by RGB. In *Achernar*, the principal could limit his involvement in one business by delegating day-to-day activities to his managers and could eliminate his 2-4 hour-per-week oversight of another business currently managed by his son.

[11] *See, e.g., V.O.B. Incorporated*, 5 FCC Rcd 5872, 5874 ¶ 13 (Rev. Bd. 1990)(although attorney proposing integration at FM facility intended to rely on assistants in reducing time at law firm, credit was denied where he acknowledged it would be difficult to delegate much of his law practice because his clients liked to depend on the fact that he was their attorney).

[12] RGB asserts that Figueroa has previously reduced to 20 hours the time devoted to his law practice in order to permit him to serve as a full-time university professor between 1975 and 1983, *see* Reply Br. at ¶ ¶ 21, 25; however, RGB has not set out the details that would permit us to compare the two situations or evaluate his current proposal. We note that an applicant previously argued before the Board (albeit unsuccessfully) that a full-time professor's position was no bar to full-time integration at an FM broadcast facility. *Kennelwood Broadcasting Company, Inc.*, 6 FCC Rcd 2894, 2895 ¶ ¶ 7-13 (Rev. Bd. 1991)(subsequent history omitted).

[13] *See, e.g., V.O.B.*, 5 FCC Rcd at 5874 (full-time law practice inconsistent with full-time commitment to station); *Royce International Broadcasting*, 4 FCC Rcd 7139, 7142 (Rev. Bd. 1989) (proposal to continue working at another station requiring 80-hour work week not credited), *review denied*, 5 FCC Rcd 7063 (1990); *Caldwell Broadcasting Corp.*, 100 FCC 2d 115, 125 (Rev. Bd. 1985)(proposal requiring 80-hour work week plus round trip commute to law practice not credited) (subsequent history omitted).

[14] The cases cited by RGB in its Reply Brief at n.8 do not require a contrary result. *See Lynn Broadcasting*, 7 FCC Rcd 8562, 8569 (Rev. Bd. 1992) (day-to-day involvement to be taken over by co-owner and experienced employee); *Hugh M. McBeath*, 103 FCC 2d 386, 389 (Rev. Bd. 1986) (applicant had disposed of or accommodated outside interests), *review denied*, FCC 86-292, released June 26, 1986; *Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1108 (Rev. Bd. 1984) ("unrebutted undertakings (with specifics) to curtail their other business activities"), *review denied*, 100 FCC 2d 941 (1985); *Bradley, Hand & Triplett*, 89 FCC 2d 657, 660-61 & n.4 (Rev. Bd. 1982) (involvement with other interests already limited). Board Member Blumenthal does not fully accord with this analysis. *See Linda U. Kulinsky*, FCC 93R-43, adopted Aug. 12, 1993 (dissent); *Kevin Potter*, 6 FCC Rcd 7278, 7281 (Rev. Bd. 1991 (concurring *dubitante*).

[15] As the Board has seen, even integration promises found acceptable because of a promise of absentee ownership or testimony about previous time commitments and arrangements for managing other business interests do not always reflect a reliable commitment to the new station. *See Kevin Potter*, 7 FCC Rcd 4342 (1992) (promise of absentee ownership credited even after withdrawal of pledge), *settlement approved*, FCC 921-065) (OGC, July 20, 1992) (applicants relieved of integration pledges when settlement agreement approved); *Central Texas Broadcasting Co.,Ltd.*, 90 FCC Rcd 583, 585-89 (Rev. Bd. 1982) (testimony as to time commitments of other business interests and management arrangements credited) (majority decision), *rev. denied*, FCC 83-415 (Sept. 21, 1983), *aff'd sub nom. Blake-Potash Corp. v. FCC*, No. 83-2112 (D.C. Cir. Apr. 26, 1985), *assignment of license approved*, 64 RR 2d 332, 333 (Vid. Ser. Div. 1987) (station assigned for substantial profit in shortest permissible time because principal was "on 'two career paths' and the broadcast station took more time than he had to devote to it.")

further undermine Figueroa's integration proposal. RGB is entitled, at most,[16] to seventy-five and one-half percent quantitative integration credit.[17]

UNITED BROADCASTING COMPANY

22. United is a general partnership comprised of four individuals, Luis A. Guzman Lluberes, Ana M. Velez Borras, Josantonio Mellado Romero, and Carmen Gonzalez Vega. *Initial Decision*, 7 FCC Rcd at 7687 ¶ 46. Guzman and Velez are married to one another as are Mellado and Gonzalez. *Id.* Each couple owns a fifty percent general partnership interest as joint tenants and has one vote in the partnership. *Id.* They propose to hold the following full-time positions: Velez, general manager; Mellado, program director; Guzman, sales and marketing director; and Gonzalez, business manager. *Id.* at 7687-7688 ¶ ¶ 48, 50, 54, 57. The ALJ credited each proposal and awarded the applicant one hundred percent quantitative integration credit. *Id.* at 7689-7690 ¶ ¶ 63-66.

23. The opposing parties challenge the quantitative percentage awarded by the ALJ but differ on which of the principals' proposals to reject: RGB would discount those of Guzman and Gonzales; Passalacqua, those of Velez and Gonzales; and McComas, all of them. The challenges, in main part, are premised on United's proposed scheme of determining station policy by a "consensus" of the four partners acting as a group. Thus, the exceptions contend, in essence, that the principals will merely implement rather than determine or establish policy in their respective departments. Passalacqua would further deny credit to Velez because she has no past broadcast experience. And, McComas asserts that neither Velez nor Gonzales is certain as to how each would fill their work weeks, and much of Guzman's time as sales manager will be spent on non-managerial tasks such as direct solicitation of advertising.

24. We will not disturb the ALJ's conclusions. The proposed roles of the principals are explicitly recognized in the Commission's *Policy Statement* as managerial-level positions. 1 FCC 2d at 395. Moreover, the Commission has long held that management by consensus is not a bar to integration credit, even when there is some overlap in functions, provided each principal is seriously dedicated to managing the station and devotes full time to his or her proposed management position. *See Waters Broadcasting Corp.*, 88 FCC 2d 1204, 1208 ¶ 9 (Rev. Bd. 1981), *aff'd on point but remainder of case set aside*, 91 FCC 2d 1260, 1262 ¶ 4 (1982) (subsequent history omitted). In this regard, the ALJ found that, although the policy for the station would be set by unanimous consent of all four shareholders acting as a group,[18] the day-to-day operating decisions of each specific department will be made by the individual in charge of the department, and that individual will be responsible for executing the station's policies and hiring personnel best suited for his or her particular department. *Initial Decision*, 7 FCC Rcd at 7689 ¶ 62.[19] Moreover, the lack of past broadcast experience is not a sufficient basis for rejecting an integration pledge. *See, e.g., Goodlettsville Broadcasting Company, Inc.*, 8 FCC Rcd 57, 61 ¶ 17 (Rev. Bd. 1992). Ms. Velez has extensive business experience[20] and no showing has been made that she will not honor her commitment. Nor must an applicant "parse every minute of [its] time at the station in order to show the credibility of [its] integration proposal." *Edward F. and Pamela J. Levine*, 8 FCC Rcd at 2630-2631 n.2. Finally, management-level owners are entitled to full integration credit even though they spend significant time performing non-management duties at the station provided they also perform sufficient managerial duties. *Sunbelt, Limited Partnership*, 8 FCC Rcd 753, 754 n.10 (1993); *see Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607, 1617 ¶ 14 (Rev. Bd. 1985)(sales manager is entitled to full integration credit even when significant sales activities have accompanied the sales supervision); *Debra D. Carrigan*, 100 FCC 2d 721, 738 ¶ 25 (Rev. Bd. 1985) (manager's devotion of time to matters affecting sales does not discredit integration proposal) (subsequent history omitted).

25. RGB also contends that the ALJ erred in failing to assess a diversification demerit against United based on that applicant's failure to make a timely divestiture pledge concerning Gonzales. In a related exception stemming from the same facts, RGB contends that the ALJ erred in denying its motion to strike a portion of United Exhibit 5 reporting that Gonzales will resign from her corporate position as secretary of United Editors, publisher of

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The Board Chairman does not join in this footnote for the reasons previously set out in *Anchor Broadcasting L.P.*, 5 FCC Rcd 2432, 2444 note (Rev. Bd. 1990) (subsequent history omitted).

[16] Passalacqua and McComas would further strip RGB of credit for Arroyo's role as general manager. McComas also questions the credibility of Arroyo's role because she currently serves as her husband's secretary at the law firm and he now proposes to be subordinate to her, and she will be superintending fifty-one percent owner Marin although he testified that he can remove her at will (Tr. 95-96). We need not reach the question whether Arroyo' proposal is entitled to credit although the Board has previously denied credit where, *inter alia*, the majority partner could fire a minority partner at will, *see Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925, 933 ¶ 29 (Rev. Bd. 1991), *modified*, FCC 93-335, released July 9, 1993 (denial upheld but particular argument not addressed); *see also Hulse, Horn, Metzger & Wookey, G.P.*, 7 FCC Rcd 5090, 5094 (Rev. Bd. 1992)(Concurring Statement of Board Member Blumenthal), *review denied*, 8 FCC Rcd 1678 (1993).

[17] In light of our disposition, we do not reach exceptions by United and McComas that the proceeding should be remanded on financial and related misrepresentation issues against RGB.

[18] United notes that because each couple has only a single vote, the decisions are necessarily made on a consensus basis, not unlike any fifty-percent/fifty percent partnership. Reply at 17.

[19] RGB's reliance on *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4100-4101 ¶ 49 (Rev. Bd. 1988), for a contrary result, is misplaced. There, the Board refused to award credit for a claimed managerial role of a principal who freely acknowledged that she would not determine any station policy but would merely have a vote on the board of directors. That case is clearly inapposite here.

[20] From February 1983 to August 1991, Velez was employed as Marketing Supervisor and Senior Account Director for Lintas: Puerto Rico, a media advertising agency in Hato Rey, Puerto Rico. At Lintas, Velez was responsible for all negotiations with radio, television, and print media on behalf of Toyota Motor Company, Sterling Winthrop, Fideicomiso de Parques Nacionales, and others. From 1980 to 1981 and from 1982 to 1983, she performed similar duties with two other advertising agencies. *See*, United Exhs. 2-5.

"Artistas," a bi-weekly entertainment personalities magazine. We will deny both of RGB's exceptions. The facts are as follows.

26. United's application, filed August 16, 1988, reported that: (1) Gonzales' husband, Mellado, was president, a ninety percent owner, and an editor at United Editors, publisher of "Artistas"; (2) Gonzales was corporate secretary; and (3) both would resign their interests in United Editors in the event of a grant of United's application. Form FCC 301, § II, ¶ ¶ 4, 7. Subsequently, when the Integration and Diversification Statement was filed on December 4, 1990, United reiterated Mellado's role and resignation pledge but neglected to repeat Gonzales' pledge to resign.[21] United also omitted the resignation pledge in Exhibit 5 of its direct written case, filed on Friday, November 1, 1991, but discovered the error immediately and sent a revised Exhibit 5 to the ALJ and counsel for all parties on the next business day, Monday, November 4, 1991, under cover of letter explaining the precise nature of the correction. RGB concedes that it received a copy of the revised exhibit. At hearing held on December 9, 1991, the corrected exhibit was admitted into evidence *without objection*. Tr. 777.

27. Three months after the exhibit had been sent to all of the parties and two months after it had been admitted into evidence without objection by anyone, including RGB, RGB contended in its Proposed Findings of Fact, filed February 11, 1992 at ¶ ¶ 119, 132-133, that United must be assessed a diversification demerit based on the unrevised exhibit not in evidence. Then in its Reply to Proposed Findings, filed March 19, 1992, at ¶ 42, RGB subjoined to its reply an attachment consisting of the earlier unrevised version of United Exhibit 5. United promptly responded by filing a motion to strike the attachment. RGB followed with its own motion to strike the pertinent portion of the corrected United Exhibit 5. RGB Motion to Strike, filed May 11, 1992. The ALJ granted United's motion to strike the attachment and denied RGB's motion to partially strike the exhibit. *Initial Decision*, 7 FCC Rcd at 7682-7683 ¶ ¶ 5-9. In so doing, he found that RGB had been put on ample notice of the correction prior to the hearing and had the obligation of raising any objection to the receipt of the exhibit at the hearing session, which it had not done. *Id.* He reasoned further that grant of RGB's motion five months after the exhibit was admitted into evidence would be disruptive and encourage parties to be less vigilant at hearings because they could rely on post-hearing motions to strike.

28. We agree with the ALJ's resolution of this matter. It is clear from United's application, where Gonzales's position as corporate secretary and her resignation pledge are reported, that its Exhibit 5 is not a variance, or a comparative upgrade that would prejudice the other parties. Moreover, United promptly corrected the exhibit on or near the exchange date to conform to its application and placed the opposing parties on notice of the change, thus averting any disruption of the proceeding. Based on the above, we cannot say that the ALJ abused his discretion in accepting the corrected exhibit, particularly where there were no objections to the admission of the exhibit. Moreover, in light of the earlier reporting of the interest and resignation pledge and the lack of any substantive change in the information, the erroneous Integration and Diversification Statement was a harmless technical error. *Cf. Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 6314, 6318-6319 ¶ ¶ 14-18 (Rev. Bd. 1990) (applicant permitted to reform direct case exhibits to reflect actual integration proposal set forth earlier where there were no substantive changes, no variance or contingencies, and delay and prejudice appeared unlikely); *Charisma Broadcasting Corp.*, 6 FCC Rcd 3411, 3412-3413 ¶ ¶ 5-8 (Rev. Bd. 1991), *review denied*, 8 FCC Rcd 864 (1993) (applicant awarded full-time integration credit notwithstanding omission in direct case because the showing had been reported earlier, contained no variance or limiting contingency, or otherwise called into question the validity of the exhibit.[22]

29. *Miscellaneous*. One additional matter warrants comment. McComas contends that the ALJ erred in denying its petition filed June 22, 1992, that sought the dismissal of United's application or alternatively the reopening of the record and addition of site availability, suitability, and misrepresentation issues. The petition, which was filed more than six months after the close of record, appended a legal opinion by a member of the Puerto Rico bar asserting that: (1) the land proposed by United for its transmitter site cannot, under Puerto Rico land law, be used for any purpose other than agriculture because of a restrictive covenant; and (2) the title on the land purportedly held by United is invalid. United opposed the petition, arguing that it was grossly untimely, and proffering a legal opinion of another member of the Puerto Rico bar that disputed the allegations. The latter opinion stated that: (1) United's proposed transmitter site is located on property identified as Farm 4790 in the land records; (2) the land was sold in five undivided interest shares with each of the five purchasers assigned a specific parcel of land for the purchaser's exclusive use; (3) on or about November 1986, Multimedia Television, Inc., one of the parcel owners, began construction of a television antenna on the land and an action was brought against Multimedia to enjoin the construction (*Luis A. Amoros, et al. v. Multimedia Television, Inc., et al.*, Puerto Rico Superior Court, Carolina Part, Case No. 86-3392); and (4) the court denied the request for injunction, concluding that each of the respective owners had legal title to their land and that the restrictive covenant was not valid. The letter went on to state that it was the attorney's considered legal opinion that the Puerto Rico Regulations and Permit Administration would authorize United to construct a radio transmitter antenna because Farm 4790 already has many radio antennas located on it and because of the court ruling.[23] The letter reported that Multimedia was awarded a permit while the *Amoros* injunction suit was pending. United also noted that the Estrada site, which McComas proposes to use, is located on one of the parcels of Farm 4790.

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[21] The Integration and Diversification Statement erroneously stated that Gonzales had "no interest in or connection with any radio or television broadcast station, CATV system, newspaper, magazine or any other media of mass communications." United justifies the error on the fact that Gonzales had no ownership interest or an active role in United Editor's operations. United Reply Br. at 11.

[22] We agree with the ALJ that Gonzales' interest is *de minimis* even if attributable. The *Policy Statement* notes that only significant management positions of non-owners in other media interests aré considered under the diversification criterion.1 FCC 2d at 393 n.5. *See* note 20 *supra*.

[23] United cannot apply for authority unless and until its FCC application is granted.

30. The ALJ denied McComas' petition on procedural and substantive grounds. *Memorandum Opinion and Order*, FCC 92M-1048, released November 19, 1992. He found that all of the allegations raised related to matters that were known or could have been reasonably known many months before and that, in any event, United demonstrated that it had title to the land, that the land is suitable, and that the land will be available for its intended use. *Id.*

31. We conclude that the ALJ properly denied McComas' petition. Where, as here, an applicant seeks to reopen the record after the close of record, it must show: (1) that it relies on new or newly discovered evidence that could not, through the exercise of due diligence, have discovered earlier; (2) that the new evidence, if proven, would raise a substantial and material question of fact affecting the ultimate outcome of the proceeding; and (3) that there is a substantial likelihood of proving its potentially disqualifying allegations if the case is remanded for further hearings. *See, e.g., Eve Ackerman*, 8 FCC Rcd 4205, 4205 ¶ 6 (1993). McComas' petition was grossly untimely because it was not filed until more than six months after the record was closed and McComas made no showing why she could not have raised her concerns earlier. Thus, the petition must be considered only if there is a likelihood that the potentially disqualifying allegations will be proven. No such showing was made here. Rather, the pleadings and supporting documentation appear to establish the opposite. It appears that United owns the property on which it intends to construct its transmitting antenna; that there are other antennas on the "questionable" parcels of land, including Estrada's tower on which McComas proposes to place its antenna; that one court has ruled that there are no valid restrictive covenants that would preclude construction of such an antenna; and that authority to construct a tower has been previously given by the appropriate authorities.

32. *Summary*. All decisionally significant exceptions have been addressed. Passalacqua does not have a viable transmitter site and has not established good cause for amending to a new site. Its application, therefore, is dismissed. Under the "best practicable service" criterion, United is entitled to a preference over both RGB, which has been awarded only seventy-four and one-half percent quantitative integration credit, and McComas, which could not prevail on the qualitative aspect of her integration proposal even if the exceptions directed against her application are resolved in her favor. On all other comparative factors, RGB and McComas cannot prevail. Thus, a grant of United's application will best serve the public interest, convenience and necessity.

33. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend, filed January 19, 1993, and supplement, filed February 16, 1993, by Roberto Passalacqua IS DENIED, and the amendment IS REJECTED; that its Motion to Accept Corrected Exceptions and Brief, filed January 19, 1993, and erratum, filed April 7, 1993 ARE GRANTED; and that its supplements to exceptions and reply, filed April 7, 1993, ARE DENIED; and that the Petition for Leave to Amend, filed August 10, 1993, by Irene Rodriguez Diaz McComas IS GRANTED, and the amendment IS ACCEPTED for reporting purposes only; and

34. IT IS FURTHER ORDERED, That the application of United Broadcasters Company (File No. BPH-880816OW) for a construction permit for a new FM station at Rio Grande, Puerto Rico, IS GRANTED; that the applications of Rio Grande Broadcasting Co. (File No. BPH-880815MV) and Irene Rodriguez Diaz De McComas (File No. BPH-880816OR) ARE DENIED; and that the application of Roberto Passalacqua (File No. BPH-880816NN) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

BOTETOURT COUNTY SCHOOL BOARD
Roanoke, Virginia — File No. BPLIF-920424EE

AMERICAN FOUNDATION FOR INSTRUCTIONAL TELEVISION
Roanoke, Virginia — File No. BPLIF-911125DC

For Construction Permit and License in the Instructional Television Fixed Service on Channels B1, B2, B3, and B4

MEMORANDUM OPINION AND ORDER

Adopted: August 10, 1993; Released: August 30, 1993

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Botetourt County School Board ("Botetourt") and American Foundation for Instructional Television ("AFIT"), each seeking a construction permit and license in the Instructional Television Fixed Service ("ITFS") on channels B1-B4 in the Roanoke, Virginia area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Botetourt and AFIT. Botetourt is qualified to be an ITFS licensee. It is a governmental organization engaged in the formal education of enrolled students, and it is accredited by the Southern Association of Colleges and Schools. Although Botetourt proposes to serve students outside its district, because it also proposes to serve schools within its own district, it qualifies as a local applicant.[1] AFIT is a nonprofit educational organization which has submitted the appropriate letters of intended use from schools engaged in the formal education of enrolled students which will receive its service and are themselves accredited by either the Association of Independent Colleges and Schools or by the State of Virginia. *See* 47 C.F.R. §74.932(a)(4).[2] Hence, AFIT is also a qualified ITFS applicant.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523* (*Second Report and Order*), 101 FCC2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants. Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[3] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Botetourt and AFIT are awarded points based on the following criteria:

Localism. Botetourt is entitled to four points for being a governmental entity serving the formal educational needs of schools within its jurisdiction; AFIT is entitled to no points, since its headquarters are located in Bessemer, Alabama.[4]

Accreditation. Botetourt, accredited by the Southern Association of Colleges and Schools, is entitled to three points for accreditation, while AFIT is entitled to no points.[5]

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[1] An applicant need not submit letters of intended use from receive sites within its own jurisdiction in order to achieve eligibility or to include students from those sites in its enrollment figures in the event of a tie resulting from the mutually exclusive selection procedure.

[2] AFIT does not claim to be accredited.

[3] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

[4] A "local" applicant is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 FCC2d at 59; 47 C.F.R. §74.932, Note 1.

[5] In order to be awarded merit points, the applicant must be accredited in its own right, as is Botetourt, and may not rely on the accreditation of the entities receiving the ITFS service. *See Second Report and Order*, 101 FCC2d at 69.

Four-Channel Limitation. Neither Botetourt nor AFIT is the licensee of, or has filed applications for, additional ITFS channels in the Roanoke, Virginia area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where amounts and types of programming proposed in an applicant's schedule and grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the lesser number of points to the applicant, so long as the excess capacity lease permits such a level of programming. *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992). Botetourt's illustrative schedule indicates an average of 21.125 hours of formal educational programming per channel per week, or programming offered for credit to enrolled students, while its programming grid indicates an average of 21 hours of formal educational programming per channel per week. Thus, Botetourt is deemed to have proposed an average of 21 hours of formal educational programming per channel per week, and is entitled to one programming merit point.

AFIT's illustrative schedule proposes an average of 24 hours of formal educational programming per channel per week, while its programming grid likewise proposes an average of 24 hours of formal educational programming per channel per week. Thus, AFIT is deemed to have proposed a total of 24 hours of formal ITFS programming and is therefore entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither Botetourt nor AFIT is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. Botetourt is entitled to points for being local, for being accredited, for observing the four-channel limitation, and for proposing at least 21 hours of formal educational programming, for a total of 10 points. AFIT is entitled to points for observing the four-channel limitation and for proposing at least 21 hours of formal educational programming, for a total of three points. Thus, the selectee is Botetourt.

PETITION TO DENY

5. AFIT has filed a petition to deny the application of Botetourt, alleging that the proposed lease agreement between Botetourt and Botetourt Communications, Inc. ("BCI"), which must be approved by the Commission, violates Section 613(b)(1) of Title VI of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §533(b)(1), and Section 63.54(a) of the Commission's rules, which is the regulatory implementation of Section 613(b)(1). Section 613(b)(1), commonly known as the cable-telco cross-ownership prohibition, by its terms prohibits any telephone company or its affiliates from providing "video programming" to subscribers in the telephone company's service area. BCI is the parent of Roanoke and Botetourt Telephone Company ("RBTC"), which is an exchange telephone service provider to small communities in the area in which BCI would be offering its wireless cable service. Since a wireless cable system transmits video programming, AFIT argues, it falls under the prohibition. Furthermore, AFIT concludes that because Botetourt is entirely dependent on BCI for funding for its ITFS facility, the Commission's rejection of the lease necessarily mandates rejection of Botetourt's entire application. AFIT alleges that Botetourt could not, without the lease approval, certify financial capacity in response to Section III of the ITFS application, which requires "reasonable assurance of present commitments" of funds to build and operate the projected facilities.

6. In support of its arguments, AFIT contends that wireless cable services were intended to be subsumed under the definition of providers of "video programming" listed in the Act and would therefore be subject to the cable-telco prohibition. AFIT points to *Cable Communications Act Rules*, 58 RR2d 1, 16 n.33 (1985), which defines "video programming" as "that which is comparable to the programming provided by a television broadcast station in Section 602(16). We interpret this to include broadcast stations, superstations, satellite delivered cable networks and pay cable...." Indeed, AFIT contends, Section 613 "extends the scope of [its] prohibition beyond the technology of cable service to all means of offering video programming directly to subscribers." Since a wireless cable system transmits video programming to subscribers, as does a television broadcast station, AFIT concludes, it must fall under Section 613(a).

7. In its opposition to the petition to deny, Botetourt offers four arguments: 1) the cable-telco prohibition is not applicable to wireless cable operations such as that contemplated by BCI; 2) BCI as a rural telephone company is in any event entitled to an exemption under Section 63.58(a) of our rules; 3) if the Commission concludes that the prohibition does apply here, BCI's wireless cable operation will comply by requesting a waiver or by excluding subscribers in the four rural towns in which it provides telephone service; and 4) Botetourt is financially qualified to construct and operate its proposed ITFS facilities because it continues to have the "reasonable assurance" of available funding required by the Commission.

8. We agree with Botetourt that the cable-telco cross-ownership ban does not apply to wireless cable services. Although Section 613(b)(1) states that no common carrier may "provide video programming directly to subscribers in its telephone service area," either directly or through an affiliate, we believe that the intent of the statute is to proscribe the transmission of video programming by a common carrier by way of cable systems, and not wireless cable, which uses microwave radio channels to transmit programming. In support of this conclusion, we first note that Section 613(b)(1) is part of a larger statute, Title VI of the Act ("Cable Communications"), the purposes of which are set forth in Section 601. Section 601 describes the six purposes of Title VI, which are in general "to establish a national policy concerning *cable* communications." (emphasis added). Section 613, in turn, as part of Title VI of the Act, depends upon the definitions set forth in Section 602(6), where "cable system" is defined as "a set of closed transmission paths... that is designed to provide cable service which includes video programming" and is provided to multiple subscribers within a community. The provisions of Section 613(b), therefore, are to be understood--even if not explicitly stated--as applying to video delivery systems consisting of closed transmission paths, *i.e.*, cable

or wire, not microwave radio channels.[6] Indeed, the legislative history of this section supports the conclusion that the interest of Congress in enacting Section 613(b) was the regulation of cable transmissions: "It is the intent of section 613(b) to codify current FCC rules concerning the provision of video programming over *cable systems* by common carriers" (emphasis added). *See* H.R. Rep. No. 934, 98th Cong. 2d Sess. 56 (1984), *reprinted at* 1984 U.S. Code Cong. & Ad. News 4655, 4693. Further, we specifically excluded DBS, MMDS, and "other radiating technologies," such as ITFS, from the Act's definition of a cable system. *See Definition of a Cable Television System*, 5 FCC Rcd 7638 (1990), *remanded in part on other grounds sub nom. Beach Communications, Inc. v. FCC*, 959 F.2d 975 (D.C. Cir.), *further considered on other grounds*, 965 F.2d 1103 (D.C. Cir. 1992), *rev'd.*, 113 S. Ct. 2096 (1993). We agree, therefore, that Section 613(b)(1) does not apply to the wireless cable service and conclude therefore that the excess capacity lease between BCI and Botetourt does not present a violation of that statute.[7]

9. Furthermore, we find the evidence submitted by AFIT in support of its contention that Botetourt is not financially qualified to be unpersuasive. AFIT has submitted an affidavit of a party who declares that he was informed by Botetourt's administrative assistant that Botetourt had no resources beyond the income provided under its excess capacity lease with BCI. Further, AFIT argues that provisions in the lease itself permit BCI to terminate the agreement unilaterally, and since Botetourt allegedly has no other source of funds, AFIT concludes, it has no "reasonable assurance" of committed funds to construct and operate the station. In support of this conclusion, AFIT points to Section 12(a) of the lease agreement, which permits BCI to terminate the agreement within six months of its execution; to Section 12(c), which permits BCI to terminate the lease within 120 days of execution upon notification to Botetourt of a failure of its business plans; to Section 12(e), which permits BCI to terminate the agreement at any time and for any reason after giving Botetourt six months' notice; and Section 26(c), which establishes the FCC grant of the pending application as a condition precedent to going forward with the lease agreement. Finally, AFIT notes that BCI has reserved the right to terminate the lease agreement if it does not manage to lease the excess capacity on twelve further ITFS channels. AFIT insists that "... the Commission should presume that BCI will exercise that right to void the agreement..." in the event that it is unsuccessful in its effort to acquire the right to excess capacity on twelve other channels. These provisions, concludes AFIT, reduce the promise of BCI's financial support to less than our requirement of a present intent of a commitment to build and operate the station. Therefore, AFIT concludes, Botetourt cannot be financially qualified.

10. Botetourt points out in its response that, in examining "reasonable assurance," the Commission does not require a firm and binding commitment from the applicant's proposed financial source. Botetourt argues that the principal case cited by AFIT in support of its claim that the lease agreement does not represent reasonable assurance in fact holds the opposite of AFIT's contention.[8] That is, in *Multistate Communications v. FCC*, 590 F.2d 1117 (D.C.

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[6] AFIT relies on the definition in Section 602(16) of the Act, which explains that "the term 'video programming' means programming provided by, or generally considered comparable to programming provided by, a television broadcast station." This definition refers to the nature of the programming offered on a cable service, not the means of transmission. A cable system is capable of transmitting not only video programming, but also audio, data, and a variety of other signals. The definition in subsection (16) merely specifies a particular service provided by cable systems. Further, this focus ignores the definition of a cable system in Section 602(6), as noted above.

[7] Our conclusion that the prohibitions of Section 613 (b)(1) do not apply to BCI's proposed wireless cable service obviates AFIT's claim that BCI is not entitled to the rural exemption of Section 63.58 of our rules, which provides that a telephone common carrier is exempt from the restriction if the carrier's service area contains none of the following: 1) any incorporated place of 2,500 inhabitants or more, or any part thereof; 2) any unincorporated place of 2,500 inhabitants or more, or any part thereof; or 3) any other territory, incorporated or unincorporated, included in an urbanized area. In a late-filed reply to the opposition to the petition to deny, AFIT alleges that BCI is not entitled to this exemption and in fact charges that BCI intentionally misrepresented its service area in its opposition in order to claim the exemption. AFIT asserts that BCI represents the telephone service area of its subsidiary RBTC to be four towns with a total population of 2,102, which would conform to the parameters of the exemption, whereas RBTC represented to the Commission in another proceeding that it provided telephone services to over 6,000 telephone subscribers in Botetourt County. Further, AFIT cites the 1980 Census of Population which ascribes a population of 23,270 to Botetourt County, RBTC's service area. Finally, AFIT asserts that a portion of Botetourt County lies within the urbanized area of Roanoke, Virginia. AFIT alleges, in fact, that the discrepancies in RBTC's statements as to its service areas are a deliberate misrepresentation to the Commission which in turn demonstrates that Botetourt is not fit to be a Commission licensee. In its response to the reply, Botetourt contends that AFIT has misread the rule and misunderstood its purpose. Botetourt points out that Section 63.58 permits an exemption to a telephone common carrier if its proposed service area "contains" no "places" with more than 2,500 inhabitants and no "territory" included in an urbanized area. Botetourt had included with its opposition a declaration of BCI's Director of Marketing, who noted that RBTC serves four towns in Botetourt County, none of which has a population of 2,500 or more, and in its response, Botetourt submits a declaration of the Botetourt County Assistant County Administrator, Ned C. McElwaine, who confirms that Botetourt County--a portion of which is RBTC's service area-- "contains" no incorporated or unincorporated place of 2,500 or more inhabitants. Mr. McElwaine also asserts that only one square mile of the Roanoke urbanized area extends into Botetourt County and that most of this small area is served by another telephone company. BCI's claimed entitlement to the rural exemption is premised on its satisfaction of the service area restrictions of Section 63.58 of our rules which, in view of the above declarations, it has *prima facie* demonstrated. Under these circumstances, the alleged discrepancies by themselves cannot be said to be deliberate misstatements. As initially noted, the prohibitions of Section 613(b)(1) do not apply in this case and, accordingly, we do not need to reach the merits of whether or not the rural exemption applies to this case.

[8] The other cases cited by AFIT are likewise inapposite. In *Marlin Broadcasting*, 68 RR2d 534, 535 (1990), the applicant was held not to be financially qualified because it had obtained its reasonable assurance of funding after having certified financial capacity. In *Parkell Broadcasting*, 32 RR2d 812, 814 (1975), the applicant was found to be financially qualified even though its letter of loan approval indicated that grant of the loan was subject to final review of the bank loan committee. In *D.H. Overmyer Communications, Inc.*, 8 RR2d 96, 101 (1966), the

Cir. 1978), *cert. denied*, 440 U.S. 959 (1978), the court held that a petitioner who had been judged by the FCC not to have a reasonable assurance of financing had in fact obtained the required assurance, even though the letter stating the intent of a bank to provide funding established grant of the license application as a condition precedent to extending its loan and although additional information and further bank action might later be required before the funds would be forthcoming. The court in fact noted that the Commission does not require a binding commitment but only reasonable assurance of a party's intent to provide financing. *Id.* at 1119. Furthermore, Botetourt has submitted declarations of BCI's Director of Marketing and Botetourt's Assistant Superintendent which establish the intent of both parties to continue in their lease agreement.

11. We agree with Botetourt that it has shown reasonable assurance of available funds to construct and operate its station. We do not regard AFIT's concerns with provisions of the lease as indicating lack of reasonable assurance. It is common, first of all, for an ITFS licensee to fund construction and operation of its facilities through an excess capacity lease.[9] Indeed, the right to lease excess capacity came about as a result of our recognition that educational entities holding ITFS licenses often lack the financial wherewithal to build and operate ITFS systems, and we envisioned the leasing of excess capacity as a means of creating business relationships between educational institutions and wireless cable companies that would permit ITFS service to flourish. *See Instructional Television Fixed Service Report and Order in Gen. Docket 80-112*, 94 FCC2d 1203, 1250 (1983). Second, while we adhere to our original conviction that the essential educational purpose of ITFS must be advanced, we also recognize the commercial necessity that excess capacity lessees be able to protect their interests as well. Third, we have consistently granted ITFS applications which include leases that potentially violate our policies but have conditioned such grants on subsequent amendment of the leases to bring their provisions into compliance. In the present case, we see nothing unusual in establishing grant of an ITFS license as a condition precedent to going forth with the construction of ITFS facilities, since the existence of a license is an obvious precondition to any other obligations between the parties. Likewise, permitting BCI to maintain the right to terminate the lease on six months' notice to Botetourt is permissible because the notice period should provide Botetourt with sufficient time to find a replacement wireless cable operator and maintain its educational service.[10] In addition, we note that the concern with BCI's untrammeled right to terminate the lease agreement within six months or within 120 days of execution is moot, since these periods are now past and the lease was not cancelled. Finally, while we find nothing irregular in BCI's insistence that it requires excess capacity from sixteen ITFS channels to make its operation commercially viable, we do assume that parties to a contract such as the lease will operate in good faith, and thus we will not presume, as would AFIT, that BCI will terminate the agreement if it cannot conclude further leases for twelve channels. As AFIT concedes, "BCI has bargained for and has received" this right to terminate.[11]

12. In sum, we conclude that Section 613(b)(1) does not apply to the present case, that Botetourt has made no statements adversely reflecting on its fitness to become a Commission licensee, and that there is no issue raised as to its financial qualifications. Accordingly, the petition to deny of AFIT will be denied.

OTHER MATTERS

13. Botetourt proposes to lease its excess capacity for non-ITFS use as permitted by Section 74.931, and has submitted a copy of its lease with BCI which conforms in all respects with Commission requirements. Accordingly, we find Botetourt to be fully qualified to be an ITFS licensee and conclude that the grant of Botetourt's application would serve the public interest, convenience, and necessity.

14. Accordingly, IT IS ORDERED, That the petition to deny and the application filed by American Foundation for Instructional Television (BPLIF-911125DC) ARE DENIED, and the application of Botetourt County School Board (BPLIF-920424EE) IS GRANTED.

15. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

applicant was found to be financially qualified even though its loan was contingent on its financial condition not changing adversely. None of these cases supports AFIT's contention that Botetourt lacks reasonable assurance of funding.

[9] We note in passing that an affidavit of a party attesting to a another person's assertions, such as the affidavit provided by AFIT, is hearsay and as such has no probative value under Section 309(d).

[10] In fact, the declaration of the Director of Marketing and Communications of BCI also attests to the fact that BCI officials have met with the President of MTI, a company likewise interested in establishing a wireless cable system in the area, to discuss their conflicting interests and to assure him of their intent to go forward with their agreement with Botetourt. There is, therefore, at least one other wireless cable company apparently willing to replace BCI if it terminates its lease agreement with Botetourt.

[11] AFIT argues in its petition that there is little likelihood that BCI could negotiate rights to sixteen channels in the area because of current leases of channel capacity. AFIT concludes that the A, B, D, and G channels, two C channels, and MDS channel 1 remain available to any applicant, for a total of nineteen channels. Because a sufficient number of channels is at least available to fulfill BCI's purposes, we do not believe that BCI should be forced to prove its intent to continue in its agreement with Botetourt by having twelve other channels in hand before we approve its lease agreement, particularly when its applications for the D and G channels are subject to a similar petition to deny as in the present case. Indeed, a decision here will contribute to the probability of BCI's acquisition of sixteen channels.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

EXCELLENCE IN EDUCATION NETWORK
Roanoke, Virginia — File No. BPLIF-911205DA

SALEM CITY SCHOOL BOARD
Roanoke, Virginia — File No. BPLIF-920424EA

For Construction Permit and License in the Instructional Television Fixed Service on Channels G1, G2, G3, and G4

MEMORANDUM OPINION AND ORDER

Adopted: August 10, 1993; Released: August 30, 1993

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Salem City School Board ("Salem") and Excellence in Education Network ("EEN"), each seeking a construction permit and license in the Instructional Television Fixed Service ("ITFS") on channels G1-G4 in the Roanoke, Virginia area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Salem and EEN. Salem is qualified to be an ITFS licensee. It is a governmental organization engaged in the formal education of enrolled students, and it is accredited by the Southern Association of Colleges and Schools. Although Salem proposes to serve students outside its district, because it also proposes to serve schools within its own district, it qualifies as a local applicant.[1] EEN is a nonprofit educational organization which has submitted the appropriate letters of intended use from schools engaged in the formal education of enrolled students which will receive its service and are themselves accredited by the Association of Independent Colleges and Schools. *See* 47 C.F.R. §74.932(a)(4).[2] Hence, EEN is also a qualified ITFS applicant.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 FCC2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants. Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[3] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Salem and EEN are awarded points based on the following criteria:

Localism. Salem is entitled to four points for being a governmental entity serving the formal educational needs of schools within its jurisdiction; EEN is entitled to no points, since its headquarters are located in Birmingham, Alabama.[4]

Accreditation. Salem, accredited by the Southern Association of Colleges and Schools, is entitled to three points for accreditation, while EEN is entitled to no points.[5]

Four-Channel Limitation. Neither EEN nor Salem is the licensee of, or has filed applications for, additional ITFS channels in the Roanoke, Virginia area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

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[1] An applicant need not submit letters of intended use from receive sites within its own jurisdiction in order to achieve eligibility or to include students from those sites in its enrollment figures in the event of a tie resulting from the mutually exclusive selection procedure.

[2] EEN does not claim to be accredited.

[3] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

[4] A "local" applicant is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 FCC2d at 59; 47 C.F.R. §74.932, Note 1.

[5] In order to be awarded merit points, the applicant must be accredited in its own right, as is Salem. *See Second Report and Order*, 101 FCC2d at 69.

Instructional Programming. ITFS applicants detail their formal educational and other iTFS programming proposals in both a program schedule and a program "grid." EEN's illustrative schedule indicates an average of 24 hours of formal educational programming per channel per week, or programming offered for credit to enrolled students, while its programming grid likewise indicates an average of 24 hours of formal educational programming per channel per week. Thus, EEN is deemed to have proposed an average of 24 hours of formal educational programming per channel per week, and is entitled to one programming merit point.

Salem's illustrative schedule proposes an average of 21 hours of formal educational programming per channel per week, while its programming grid proposes an average of 21 hours of formal educational programming per channel per week. Thus, Salem is deemed to have proposed a total of 21 hours of formal ITFS programming and is therefore entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither Salem nor EEN is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. Salem is entitled to points for being local, for being accredited, for proposing at least 21 hours of formal educational programming and for observing the four-channel limitation, for a total of ten points. EEN is entitled to points for proposing at least 21 hours of formal educational programming and for observing the four-channel limitation, for a total of three points. Thus, the selectee is Salem.

PETITION TO DENY

5. EEN has filed a petition to deny the application of Salem, alleging that the proposed lease agreement between Salem and Botetourt Communications, Inc. ("BCI"), which must be approved by the Commission, violates Section 613(b)(1) of Title VI of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §533(b)(1), and Section 63.54(a) of the Commission's rules, which is the regulatory implementation of Section 613(b)(1). Section 613(b)(1), commonly known as the cable-telco cross-ownership prohibition, by its terms prohibits any telephone company or its affiliates from providing "video programming" to subscribers in the telephone company's service area. BCI is the parent of Roanoke and Botetourt Telephone Company ("RBTC"), which is an exchange telephone service provider to small communities in the area in which BCI would be offering its wireless cable service. Since a wireless cable system transmits video programming, EEN argues, it falls under the prohibition. Furthermore, EEN concludes that because Salem is entirely dependent on BCI for funding for its ITFS facility, the Commission's rejection of the lease necessarily mandates rejection of Salem's entire application. EEN alleges that Salem could not, without the lease approval, certify financial capacity in response to Section III of the ITFS application, which requires "reasonable assurance of present commitments" of funds to build and operate the projected facilities.

6. In support of its arguments, EEN contends that wireless cable services were intended to be subsumed under the definition of providers of "video programming" listed in the Act and would therefore be subject to the cable-telco prohibition. EEN points to *Cable Communications Act Rules*, 58 RR2d 1, 16 n.33 (1985), which defines "video programming" as "that which is comparable to the programming provided by a television broadcast station in Section 602(16). We interpret this to include broadcast stations, superstations, satellite delivered cable networks and pay cable...." Indeed, EEN contends, Section 613 "extends the scope of [its] prohibition beyond the technology of cable service to all means of offering video programming directly to subscribers." Since a wireless cable system transmits video programming to subscribers, as does a television broadcast station, EEN concludes, it must fall under the interdiction of Section 613(a).

7. In its opposition to the petition to deny, Salem offers four arguments: 1) the cable-telco prohibition is not applicable to wireless cable operations such as that contemplated by BCI; 2) BCI as a rural telephone company is in any event entitled to the exemption under Section 63.58(a) of our rules; 3) if the Commission concludes that the prohibition does apply here, BCI's wireless cable operation will comply by requesting a waiver or by excluding subscribers in the four rural towns in which it provides telephone service; and 4) Salem is financially qualified to construct and operate its proposed ITFS facilities because it continues to have the "reasonable assurance" of available funding required by the Commission.

8. We agree with Salem that the cable-telco cross-ownership ban does not apply to wireless cable services. Although Section 613(b)(1) states that no common carrier may "provide video programming directly to subscribers in its telephone service area," either directly or through an affiliate, we believe that the intent of the statute is to proscribe the transmission of video programming by a common carrier by way of cable systems, and not wireless cable, which uses microwave radio channels to transmit programming. In support of this conclusion, we first note that Section 613(b)(1) is part of a larger statute, Title VI of the Act ("Cable Communications"), the purposes of which are set forth in Section 601. Section 601 describes the six purposes of Title VI, which are in general "to establish a national policy concerning *cable* communications." (emphasis added). Section 613, in turn, as part of Title VI of the Act, depends upon the definitions set forth in Section 602(6), where "cable system" is defined as "a set of closed transmission paths... that is designed to provide cable service which includes video programming" and is provided to multiple subscribers within a community. The provisions of Section 613(b), therefore, are to be understood--even if not explicitly stated--as applying to video delivery systems consisting of closed transmission paths, *i.e.*, cable or wire, not microwave radio channels.[6] Indeed, the legislative history of this section supports the conclusion that the

[6] EEN relies on the definition in Section 602(16) of the Act, which explains that "the term 'video programming' means programming provided by, or generally considered comparable to programming provided by, a television broadcast station." This definition refers to the nature of the programming offered on a cable service, not the means of transmission. A cable system is capable of transmitting not only video programming, but also audio, data, and a variety of other signals. The definition in

interest of Congress in enacting Section 613(b) was the regulation of cable transmissions: "It is the intent of section 613(b) to codify current FCC rules concerning the provision of video programming over *cable systems* by common carriers" (emphasis added). *See* H.R. Rep. No. 934, 98th Cong. 2d Sess. 56 (1984), *reprinted at* 1984 U.S. Code Cong. & Ad. News 4655, 4693. Further, we specifically excluded DBS, MMDS, and "other radiating technologies," such as ITFS, from the Act's definition of a cable system. *See Definition of a Cable Television System,* 5 FCC Rcd 7638 (1990), *remanded in part on other grounds sub nom. Beach Communications, Inc. v. FCC,* 959 F.2d 975 (D.C. Cir.), *further considered on other grounds,* 965 F.2d 1103 (D.C. Cir. 1992), *rev'd.,* 113 S. Ct. 2096 (1993). We agree, therefore, that Section 613(b)(1) does not apply to the wireless cable service and conclude therefore that the excess capacity lease between BCI and Salem does not present a violation of that statute.[7]

9. Furthermore, we find the evidence submitted by EEN in support of its contention that Salem is not financially qualified to be unpersuasive. EEN has submitted an affidavit of a party who declares that he was informed by Salem's superintendent that Salem had no resources beyond the income provided under its excess capacity lease with BCI. Further, EEN argues that provisions in the lease itself permit BCI to terminate the agreement unilaterally, and since Salem allegedly has no other source of funds, EEN concludes, it has no "reasonable assurance" of committed funds to construct and operate the station. In support of this conclusion, EEN points to Section 12(a) of the lease agreement, which permits BCI to terminate the agreement within six months of its execution; to Section 12(c), which permits BCI to terminate the lease within 120 days of execution upon notification to Salem of a failure of its business plans; to Section 12(e), which permits BCI to terminate the agreement at any time and for any reason after giving Salem six months' notice; and Section 26(c), which establishes the FCC grant of the pending application as a condition precedent to going forward with the lease agreement. Finally, EEN notes that BCI has reserved the right to terminate the lease agreement if it does not manage to lease the excess capacity on twelve further ITFS channels. EEN insists that "... the Commission should presume that BCI will exercise that right to void the agreement..." in the event that it is unsuccessful in its effort to acquire the right to excess capacity on twelve other channels. These provisions, concludes EEN, reduce the promise of BCI's financial support to less than our requirement of a present intent of a commitment to build and operate the station. Therefore, EEN concludes, Salem cannot be financially qualified.

10. Salem points out in its response that, in examining "reasonable assurance," the Commission does not require a firm and binding commitment from the applicant's proposed financial source. Salem argues that the principal case cited by EEN in support of its claim that the lease agreement does not represent reasonable assurance in fact holds the opposite of EEN's contention.[8] That is, in *Multistate Communications v. FCC,* 590 F.2d 1117 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 959 (1978), the court held that a petitioner who had been judged by the FCC not to have a reasonable assurance of financing had in fact obtained the required assurance, even though the letter stating the intent of a bank to provide funding established grant of the license application as a condition precedent to extending its loan and although additional information and further bank

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subsection (16) merely specifies a particular service provided by cable systems. Further, this focus ignores the definition of a cable system in Section 602(6), as noted above.

[7] Our conclusion that the prohibitions of Section 613(b)(1) do not apply to BCI's proposed wireless cable service obviates EEN's claim that BCI is not entitled the rural exemption of Section 63.58 of our rules, which provides that a telephone common carrier is exempt from the restriction if the carrier's service area contains none of the following: 1) any incorporated place of 2,500 inhabitants or more, or any part thereof; 2) any unincorporated place of 2,500 inhabitants or more, or any part thereof; or 3) any other territory, incorporated or unincorporated, included in an urbanized area. In a late-filed reply to the opposition to the petition to deny, EEN alleges that BCI is not entitled to this exemption and in fact charges that BCI intentionally misrepresented its service area in its opposition in order to claim the exemption. EEN asserts that BCI represents the telephone service area of its subsidiary RBTC to be four towns with a total population of 2,102, which would conform to the parameters of the exemption, whereas RBTC represented to the Commission in another proceeding that it provided telephone services to over 6,000 telephone subscribers in Botetourt County. Further, EEN cites the 1980 Census of Population which ascribes a population of 23,270 to Botetourt County, RBTC's service area. Finally, EEN asserts that a portion of Botetourt County lies within the urbanized area of Roanoke, Virginia. EEN alleges, in fact, that the discrepancies in RBTC's statements as to its service areas are a deliberate misrepresentation to the Commission which in turn demonstrates that Salem is not fit to be a Commission licensee. In its response to the reply, Salem contends that EEN has misread the rule and misunderstood its purpose. Salem points out that Section 63.58 permits an exemption to a telephone common carrier if its proposed service area "contains" no "places" with more than 2,500 inhabitants and no "territory" included in an urbanized area. Salem had included with its opposition a declaration of BCI's Director of Marketing, who noted that RBTC serves four towns in Botetourt County, none of which has a population of 2,500 or more, and in its response, Salem submits a declaration of the Botetourt County Assistant County Administrator, Ned C. McElwaine, who confirms that Botetourt County--a portion of which is RBTC's service area-- "contains" no incorporated or unincorporated place of 2,500 or more inhabitants. Mr. McElwaine also asserts that only one square mile of the Roanoke urbanized area extends into Botetourt County and that most of this small area is served by another telephone company. BCI's claimed entitlement to the rural exemption is premised on its satisfaction of the service area restrictions of Section 63.58 of our rules which, in view of the above declarations, it has *prima facie* demonstrated. Under these circumstances, the alleged discrepancies by themselves cannot be said to be deliberate misstatements. As initially noted, the prohibitions of Section 613(b)(1) do not apply in this case and, accordingly, we do not need to reach the merits of whether or not the rural exemption applies to this case.

[8] The other cases cited by EEN are likewise inapposite. In *Marlin Broadcasting,* 68 RR2d 534, 535 (1990), the applicant was held not to be financially qualified because it had obtained its reasonable assurance of funding after having certified financial capacity. In *Parkell Broadcasting,* 32 RR2d 812, 814 (1975), the applicant was found to be financially qualified even though its letter of loan approval indicated that grant of the loan was subject to final review of the bank loan committee. In *D.H. Overmyer Communications, Inc.,* 8 RR2d 96, 101 (1966), the applicant was found to be financially qualified even though its loan was contingent on its financial condition not changing adversely. None of these cases supports EEN's contention that Salem lacks reasonable assurance of funding.

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11. We agree with Salem that it has shown reasonable assurance of available funds to construct and operate its station. We do not regard EEN's concerns with provisions of the lease as indicating lack of reasonable assurance. It is common, first of all, for an ITFS licensee to fund construction and operation of its facilities through an excess capacity lease.[9] Indeed, the right to lease excess capacity came about as a result of our recognition that educational entities holding ITFS licenses often lack the financial wherewithal to build and operate ITFS systems, and we envisioned the leasing of excess capacity as a means of creating business relationships between educational institutions and wireless cable companies which would permit ITFS service to flourish. *See Instructional Television Fixed Service Report and Order in Gen. Docket 80-112,* 94 FCC2d 1203, 1250 (1983). Second, while we adhere to our original conviction that the essential educational purpose of ITFS must be advanced, we also recognize the commercial necessity that excess capacity lessees be able to protect their interests as well. Third, we have consistently granted ITFS applications which include leases that potentially violate our policies but have conditioned such grants on a subsequent amendment of the leases to bring their provisions into compliance. In the present case, we see nothing unusual in establishing grant of an ITFS license as a condition precedent to going forth with the construction of ITFS facilities, since the existence of a license is an obvious precondition to any other obligations between the parties. Likewise, permitting BCI to maintain the right to terminate the lease on six months' notice to Salem is permissible because the notice period should provide Salem with sufficient time to find a replacement wireless cable operator and maintain its educational service.[10] In addition, we note that the concern with BCI's untrammeled right to terminate the lease agreement within six months or within 120 days of execution is moot, since these periods are now past and the lease was not cancelled. Finally, while we find nothing irregular in BCI's insistence that it requires excess capacity from sixteen ITFS channels to make its operation commercially viable, we do assume that parties to a contract such as the lease will operate in good faith, and thus we will not "presume," as would EEN, that BCI will terminate the agreement if it cannot conclude further leases for twelve channels. As EEN concedes, "BCI has bargained for and has received" this right to terminate.[11]

12. In sum, we conclude that Section 613(b)(1) does not apply to the present case, that Salem has made no statements adversely reflecting on its fitness to become a Commission licensee, and that there is no issue raised as to its financial qualifications. Accordingly, the petition to deny of EEN will be denied.

OTHER MATTERS

13. Salem proposes to lease its excess capacity for non-ITFS use as permitted by Section 74.931, and has submitted a copy of its lease with BCI which conforms in all respects with Commission requirements. Accordingly, we find Salem to be fully qualified to be an ITFS licensee and conclude that the grant of Salem's p application would serve the public interest, convenience, and necessity.

14. Accordingly, IT IS ORDERED, That the petition to deny and the application filed by Excellence in Education Network (BPLIF-911205DA) ARE DENIED, and the application of Salem City School Board (BPLIF-920424EA) IS GRANTED.

15. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[9] We note in passing that an affidavit of a party attesting to a another person's assertions, such as the affidavit provided by EEN, is hearsay and as such has no probative value under Section 309(d).

[10] In fact, the declaration of the Director of Marketing and Communications of BCI also attests to the fact that BCI officials have met with the President of MTI, a company likewise interested in establishing a wireless cable system in the area, to discuss their conflicting interests and to assure him of their intent to go forward with their agreement with Salem. There is, therefore, at least one other wireless cable company apparently willing to replace BCI if it terminates its lease agreement with Salem.

[11] EEN argues in its petition that there is little likelihood that BCI could negotiate rights to sixteen channels in the area because of current leases of channel capacity. EEN concludes that the A, B, D, and G channels, two C channels, and MDS channel 1 remain available to any applicant, for a total of nineteen channels. Because a sufficient number of channels is at least available to fulfill BCI's purposes, we do not believe that BCI should be forced to prove its intent to continue in its agreement with Salem by having twelve other channels in hand before we approve its lease agreement, particularly when its applications for the D and B channels are subject to a similar petition to deny as in the present case. Indeed, a decision here will contribute to the probability of BCI's acquisition of sixteen channels.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

SCHOOL BOARD OF ROANOKE COUNTY
Roanoke, Virginia — File No. BPLIF-920424EL

AMERICAN SCHOLASTIC TV PROGRAMMING FOUNDATION
Roanoke, Virginia — File No. BPLIF-911210DA

For Construction Permit and License in the Instructional Television Fixed Service on Channels D1, D2, D3, and D4

MEMORANDUM OPINION AND ORDER

Adopted: August 10, 1993; Released: August 30, 1993

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of American Scholastic TV Programming Foundation (ASTVPF) and the School Board of Roanoke County (Board), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels D1-D4 in the Roanoke, Virginia area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of ASTVPF and the Board. ASTVPF is qualified to be an ITFS licensee. It is a nonprofit educational organization which has submitted a statement of its educational purpose as well as the appropriate letters of intended use from schools engaged in the formal education of enrolled students which will receive its service and are themselves accredited by either the Accociation of Christian Schools International or the Virginia Department of Criminal Justice Services. *See* 47 C.F.R. §74.932(a)(4).[1] The Board is likewise qualified to be an ITFS licensee. It is a governmental organization engaged in the formal education of enrolled students, and it is accredited by the Commonwealth of Virginia Department of Education. Although the Board proposes to serve students outside its district, because it also proposes to serve schools within its own district, it qualifies as a local applicant.[2]

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 FCC2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants. Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[3] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the Board and ASTVPF are awarded points based on the following criteria:

Localism. The Board is entitled to four points for being a governmental entity serving the formal educational needs of schools within its jurisdiction, even though it also proposes to serve students outside its district. ASTVPF is entitled to no points, since its headquarters are in Edina, Minnesota.[4]

Accreditation. The Board, accredited by the Commonwealth of Virginia Department of Education, is entitled to three points for accreditation, while ASTVPF is entitled to no points.[5]

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[1] ASTVPF itself does not claim to be accredited.

[2] An applicant need not submit letters of intended use from receive sites within its own jurisdiction in order to achieve eligibility or to include students from those sites in its enrollment figures in the event of a tie resulting from the mutually exclusive selection procedure.

[3] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

[4] A "local" applicant is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 FCC2d at 59; 47 C.F.R. § 74.932, Note 1.

[5] In order to be awarded merit points, the applicant must be accredited in its own right, as is the Board, and may not rely on the accreditation of the entities receiving the ITFS service.

Four-Channel Limitation. Neither the Board nor ASTVPF is the licensee of, or has filed applications for, additional ITFS channels in the Roanoke, Virginia area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." The Board's illustrative schedule proposes an average of 21 hours of formal educational programming per channel per week, while its programming grid proposes an average of 21 hours of formal educational programming per channel per week. Thus, the Board is deemed to have proposed a total of 21 hours of formal ITFS programming and is therefore entitled to one programming merit point. ASTVPF's illustrative schedule indicates an average of 24 hours of formal educational programming per channel per week, or programming to be delivered to enrolled students for credit, while its programming grid likewise indicates an average of 24 hours of formal educational programming per channel per week. Thus, ASTVPF is deemed to have proposed an average of 24 hours of formal educational programming per channel per week, and is entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither ASTVPF nor the Board is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. The Board is entitled to points for being local, for being accredited, for proposing at least 21 hours of formal educational programming and for observing the four-channel limitation, for a total of ten points. ASTVPF is entitled to points for proposing at least 21 hours of formal educational programming and for observing the four-channel limitation, for a total of three points. Thus, the selectee is the Board.

PETITION TO DENY

5. ASTVPF has filed a petition to deny the application of the Board, alleging that the proposed lease agreement between the Board and Botetourt Communications, Inc. ("BCI"), which must be approved by the Commission, violates Section 613(b)(1) of Title VI of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §533(b)(1), and Section 63.54(a) of the Commission's rules, which is the regulatory implementation of Section 613(b)(1). Section 613(b)(1), commonly known as the cable-telco cross-ownership prohibition, by its terms prohibits any telephone company or its affiliates from providing "video programming" to subscribers in the telephone company's service area. BCI is the parent of Roanoke and Botetourt Telephone Company ("RBTC"), which is an exchange telephone service provider to small communities in the area in which BCI would be offering its wireless cable service. Since a wireless cable system transmits video programming, ASTVPF argues, it falls under the prohibition. Furthermore, ASTVPF concludes that because the Board is entirely dependent on BCI for funding for its ITFS facility, the Commission's rejection of the lease necessarily mandates rejection of the Board's entire application. ASTVPF alleges that the Board could not, without the lease approval, certify financial capacity in response to Section III of the ITFS application, which requires "reasonable assurance of present commitments" of funds to build and operate the projected facilities.

6. In support of its arguments, ASTVPF contends that wireless cable services were intended to be subsumed under the definition of providers of "video programming" listed in the Act and would therefore be subject to the prohibitions of the cable-telco prohibition. ASTVPF points to *Cable Communications Act Rules,* 58 RR2d 1, 16 n.33 (1985), which defines "video programming" as "that which is comparable to the programming provided by a television broadcast station in Section 602(16). We interpret this to include broadcast stations, superstations, satellite delivered cable networks and pay cable...." Indeed, ASTVPF contends, Section 613 "extends the scope of [its] prohibition beyond the technology of cable service to all means of offering video programming directly to subscribers." Since a wireless cable system transmits video programming to subscribers, as does a television broadcast station, ASTVPF concludes, it must fall under the interdiction of Section 613(a).

7. In its opposition to the petition to deny, the Board offers four arguments: 1) the cable-telco prohibition is not applicable to wireless cable operations such as that contemplated by BCI; 2) BCI as a rural telephone company is in any event entitled to the exemption under Section 63.58(a) of our rules; 3) if the Commission concludes that the prohibition does apply here, BCI's wireless cable operation will comply by requesting a waiver or by excluding subscribers in the four rural towns in which it provides telephone service; and 4) the Board is financially qualified to construct and operate its proposed ITFS facilities because it continues to have the "reasonable assurance" of available funding required by the Commission.

8. We agree with the Board that the cable-telco cross-ownership ban does not apply to wireless cable services. Although Section 613(b)(1) states that no common carrier may "provide video programming directly to subscribers in its telephone service area," either directly or through an affiliate, we believe that the intent of the statute is to proscribe the transmission of video programming by a common carrier by way of cable systems, and not wireless cable, which uses microwave radio channels to transmit programming. In support of this conclusion, we first note that Section 613(b)(1) is part of a larger statute, Title VI of the Act ("Cable Communications"), the purposes of which are set forth in Section 601. Section 601 describes the six purposes of Title VI, which are in general "to establish a national policy concerning *cable* communications." (emphasis added). Section 613, in turn, as part of Title VI of the Act, depends upon the definitions set forth in Section 602(6), where "cable system" is defined as "a set of closed transmission paths... that is designed to provide cable service which includes video programming" and is provided to multiple subscribers within a community. The provisions of Section 613(b), therefore, are to be understood--even if not explicitly stated--as applying to video delivery systems consisting of closed transmission paths, *i.e.,* cable

or wire, not microwave radio channels.[6] Indeed, the legislative history of this section supports the conclusion that the interest of Congress in enacting Section 613(b) was the regulation of cable transmissions: "It is the intent of section 613(b) to codify current FCC rules concerning the provision of video programming over *cable systems* by common carriers" (emphasis added). *See* H.R. Rep. No. 934, 98th Cong. 2d Sess. 56 (1984), *reprinted at* 1984 U.S. Code Cong. & Ad. News 4655, 4693. Further, we specifically excluded DBS, MMDS, and "other radiating technologies," such as ITFS, from the Act's definition of a cable system. *See Definition of a Cable Television System*, 5 FCC Rcd 7638 (1990), *remanded in part on other grounds sub nom. Beach Communications, Inc. v. FCC*, 959 F.2d 975 (D.C. Cir.), *further considered on other grounds*, 965 F.2d 1103 (D.C. Cir. 1992), *rev'd.*, 113 S. Ct. 2096 (1993). We agree, therefore, that Section 613(b)(1) does not apply to the wireless cable service and conclude therefore that the excess capacity lease between BCI and the Board does not present a violation of that statute.[7]

9. Furthermore, we find the evidence submitted by ASTVPF in support of its contention that the Board is not financially qualified to be unpersuasive. AFIT has submitted an affidavit of a party who declares that he was informed by the "chairmen [sic] of the County School Board of Roanoke" that the Board had no resources beyond the income provided under its excess capacity lease with BCI. Further, ASTVPF argues that provisions in the lease itself permit BCI to terminate the agreement unilaterally, and since the Board allegedly has no other source of funds, ASTVPF concludes, it has no "reasonable assurance" of committed funds to construct and operate the station. In support of this conclusion, ASTVPF points to Section 12(a) of the lease agreement, which permits BCI to terminate the agreement within six months of its execution; to Section 12(c), which permits BCI to terminate the lease within 120 days of execution upon notification to the Board of a failure of its business plans; to Section 12(e), which permits BCI to terminate the agreement at any time and for any reason after giving the Board six months' notice; and Section 26(c), which establishes the FCC grant of the pending application as a condition precedent to going forward with the lease agreement. Finally, ASTVPF notes that BCI has reserved the right to terminate the lease agreement if it does not manage to lease the excess capacity on twelve further ITFS channels. ASTVPF insists that "... the Commission should presume that BCI will exercise that right to void the agreement..." in the event that it is unsuccessful in its effort to acquire the right to excess capacity on twelve other channels. These provisions, concludes ASTVPF, reduce the promise of BCI's financial support to less than our requirement of a present intent of a commitment to build and operate the station. Therefore, ASTVPF concludes, the Board cannot be financially qualified.

10. The Board points out in its response that, in examining "reasonable assurance," the Commission does not require a firm and binding commitment from the applicant's proposed financial source. The Board argues that the principal case cited by ASTVPF in support of its claim that the lease agreement does not represent reasonable assurance in fact holds the opposite of ASTVPF's contention.[8] That is, in *Multistate Communications v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 959 (1978), the court held that a petitioner who had been

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[6] ASTVPF relies on the definition in Section 602(16) of the Act, which explains that "the term 'video programming' means programming provided by, or generally considered comparable to programming provided by, a television broadcast station." This definition refers to the nature of the programming offered on a cable service, not the means of transmission. A cable system is capable of transmitting not only video programming, but also audio, data, and a variety of other signals. The definition in subsection (16) merely specifies a particular service provided by cable systems. Further, this focus ignores the definition of a cable system in Section 602(6), as noted above.

[7] Our conclusion that the prohibitions of Section 613(b)(1) do not apply to BCI's proposed wireless cable service obviates ASTVPF's claim that BCI is not entitled the rural exemption of Section 63.58 of our rules, which provides that a telephone common carrier is exempt from the restrictions if the carrier's service area contains none of the following: 1) any incorporated place of 2,500 inhabitants or more, or any part thereof; 2) any unincorporated place of 2,500 inhabitants or more, or any part thereof; or 3) any other territory, incorporated or unincorporated, included in an urbanized area. In a late-filed reply to the opposition to the petition to deny, ASTVPF alleges that BCI is not entitled to this exemption and in fact charges that BCI intentionally misrepresented its service area in its opposition in order to claim the exemption. ASTVPF asserts that BCI represents the telephone service area of its subsidiary RBTC to be four towns with a total population of 2,102, which would conform to the parameters of the exemption, whereas RBTC represented to the Commission in another proceeding that it provided telephone services to over 6,000 telephone subscribers in Botetourt County. Further, ASTVPF cites the 1980 Census of Population which ascribes a population of 23,270 to Botetourt County, RBTC's service area. Finally, ASTVPF asserts that a portion of Botetourt County lies within the urbanized area of Roanoke, Virginia. ASTVPF alleges, in fact, that the discrepancies in RBTC's statements as to its service areas are a deliberate misrepresentation to the Commission which in turn demonstrates that the Board is not fit to be a Commission licensee. In its response to the reply, the Board contends that ASTVPF has misread the rule and misunderstood its purpose. The Board points out that Section 63.58 permits an exemption to a telephone common carrier if its proposed service area "contains" no "places" with more than 2,500 inhabitants and no "territory" included in an urbanized area. The Board had included with its opposition a declaration of BCI's Director of Marketing, who noted that RBTC serves four towns in Botetourt County, none of which has a population of 2,500 or more, and in its response, the Board submits a declaration of the Botetourt County Assistant County Administrator, Ned C. McElwaine, who confirms that Botetourt County--a portion of which is RBTC's service area--"contains" no incorporated or unincorporated place of 2,500 or more inhabitants. Mr. McElwaine also asserts that only one square mile of the Roanoke urbanized area extends into Botetourt County and that most of this small area is served by another telephone company. BCI's claimed entitlement to the rural exemption is premised on its satisfaction of the service area restrictions of Section 63.58 of our rules which, in view of the above declarations, it has *prima facie* demonstrated. Under these circumstances, the alleged discrepancies by themselves cannot be said to be deliberate misstatements. As initially noted, the prohibitions of Section 613(b)(1) do not apply in this case and, accordingly, we do not need to reach the merits of whether or not the rural exemption applies to this case.

[8] The other cases cited by ASTVPF are likewise inapposite. In *Marlin Broadcasting*, 68 RR2d 534, 535 (1990), the applicant was held not to be financially qualified because it had obtained its reasonable assurance of funding after having certified financial capacity. In *Parkell Broadcasting*, 32 RR2d 812, 814 (1975), the applicant was found to be financially qualified even though its

judged by the FCC not to have a reasonable assurance of financing had in fact obtained the required assurance, even though the letter stating the intent of a bank to provide funding established grant of the license application as a condition precedent to extending its loan and although additional information and further bank action might later be required before the funds would be forthcoming. The court in fact noted that the Commission does not require a binding commitment, but only reasonable assurance of a party's intent to provide financing. *Id.* at 1119. Furthermore, the Board has submitted declarations of BCI's Director of Marketing and the Board's Supervisor of Library Media Services which establish the intent of both parties to continue in their lease agreement.

11. We agree with the Board that it has shown reasonable assurance of available funds to construct and operate its station. We do not regard ASTVPF's concerns with provisions of the lease as indicating lack of reasonable assurance. It is common, first of all, for an ITFS licensee to fund construction and operation of its facilities through an excess capacity lease.[9] Indeed, the right to lease excess capacity came about as a result of our recognition that educational entities holding ITFS licenses often lack the financial wherewithal to build and operate ITFS systems, and we envisioned the leasing of excess capacity as a means of creating business relationships between educational institutions and wireless cable companies which would permit ITFS service to flourish. *See Instructional Television Fixed Service Report and Order in Gen. Docket 80-112*, 94 FCC2d 1203, 1250 (1983). Second, while we adhere to our original conviction that the essential educational purpose of ITFS must be advanced, we also recognize the commercial necessity that excess capacity lessees be able to protect their interests as well. Third, we have consistently granted ITFS applications which include leases that potentially violate our policies but have conditioned these grants on a subsequent amendment of the leases to bring their provisions into compliance. In the present case, we see nothing unusual in establishing grant of an ITFS license as a condition precedent to going forth with the construction of ITFS facilities, since the existence of a license is an obvious precondition to any other obligations between the parties. Likewise, permitting BCI to maintain the right to terminate the lease on six months' notice to the Board is permissible because the notice period should provide the Board with sufficient time to find a replacement wireless cable operator and maintain its educational service.[10] In addition, we note that the concern with BCI's untrammeled right to terminate the lease agreement within six months or within 120 days of execution is moot, since these periods are now past and the lease was not terminated. Finally, while we find nothing irregular in BCI's insistence that it requires excess capacity from sixteen ITFS channels to make its operation commercially viable, we do assume that parties to a contract such as the lease will operate in good faith, and thus we will not "presume," as would ASTVPF, that BCI will terminate the agreement if it cannot conclude further leases for twelve channels. As ASTVPF concedes, "BCI has bargained for and has received" this right to terminate.[11]

12. In sum, we conclude that Section 613(b)(1) does not apply to the present case, that the Board has made no statements adversely reflecting on its fitness to become a Commission licensee, and that there is no issue raised as to its financial qualifications. Accordingly, the petition to deny of ASTVPF will be denied.

OTHER MATTERS

13. The Board proposes to lease its excess capacity for non-ITFS use as permitted by Section 74.931, and has submitted a copy of its lease with BCI which conforms in all respects with Commission requirements. Accordingly, we find the Board to be fully qualified to be an ITFS licensee and conclude that the grant of the Board's application would serve the public interest, convenience, and necessity.

14. Accordingly, IT IS ORDERED, That the petition to deny and application filed by American Scholastic TV Programming Foundation (BPLIF-911210DA) ARE DENIED, and the application of The School Board of Roanoke County (BPLIF-920424EL) IS GRANTED.

15. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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letter of loan approval indicated that grant of the loan was subject to final review of the bank loan committee. In *D.H. Overmyer Communications, Inc.*, 8 RR2d 96, 101 (1966), the applicant was found to be financially qualified even though its loan was contingent on its financial condition not changing adversely. None of these cases supports ASTVPF's contention that the Board lacks reasonable assurance of funding.

[9] We note in passing that an affidavit of a party attesting to a another person's assertions, such as the affidavit provided by ASTVPF, is hearsay and as such has no probative value under Section 309(d).

[10] In fact, the declaration of the Director of Marketing and Communications of BCI also attests to the fact that BCI officials have met with the President of MTI, a company likewise interested in establishing a wireless cable system in the area, to discuss their conflicting interests and to assure him of their intent to go forward with their agreement with the Board. There is, therefore, at least one other wireless cable company apparently willing to replace BCI if it terminates its lease agreement with the Board.

[11] ASTVPF argues in its petition that there is little likelihood that BCI could negotiate rights to sixteen channels in the area because of current leases of channel capacity. ASTVPF concludes that the A, B, D, and G channels, two C channels, and MDS channel 1 remain available to any applicant, for a total of nineteen channels. Because a sufficient number of channels is at least available to fulfill BCI's purposes, we do not believe that BCI should be forced to prove its intent to continue in its agreement with the Board by having twelve other channels in hand before we approve its lease agreement, particularly when its applications for the B and G channels are subject to a similar petition to deny as in the present case. Indeed, a decision here will contribute to the probability of BCI's acquisition of sixteen channels.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-24

In re

Amendment of Part 74 of the
Commission's Rules With Regard
to the Instructional Television
Fixed Service

ORDER

Adopted: August 19, 1993; Released: August 30, 1993

By the Commission:

1. We recently adopted a *Notice of Proposed Rulemaking* addressing a possible change in the method by which Instructional Television Fixed Service (ITFS) applications are filed and processed.[1] We proposed an approach using filing windows, which would allow us to control better the flow of applications and process them more efficiently. In addition, we stated that during the pendency of this proposed rulemaking, we would not accept applications for new ITFS facilities or major changes in existing ITFS stations, with the following exceptions: we would accept for filing applications in which the applicant was relying on the National Telecommunications and Information Administration (NTIA) for construction funds, as well as applications submitted in response to outstanding "A" cut-off lists.[2] We added that applications which had already been tendered but not yet placed on an "A" cut-off list as of the adoption date of the *Notice* would not be placed on a cut-off list, but would instead be considered cut off as of the close of the first filing window. We took these actions in order to prevent an increase in the already significant backlog of applications pending.

2. The comments submitted in this proceeding bring up several important and complex issues that require further analysis. Such analysis will postpone completion of this proceeding and would, absent our action here, extend the ITFS application processing "freeze" beyond the period we had originally contemplated. This delay would work against our underlying purpose of hastening the authorization of new and modified ITFS facilities and would leave unmet the pressing need of educational entities, as well as their wireless cable lessees, for further facility authorizations. Accordingly, we are instructing the staff to release an "A" cut-off list containing all applications for new ITFS facilities or major changes in existing ITFS stations that were tendered for filing (but not placed on an "A" cut-off list) prior to the adoption date of the *Notice*. The staff will process such applications, as well as any competing applications that are filed in response to that list, pursuant to the existing rules. In the meantime, we will continue to analyze the matters raised in the course of this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] *Notice of Proposed Rulemaking* in MM Docket No. 93-24, 8 FCC Rcd 1275 (1993) (*Notice*).
[2] We stated that NTIA applications would not be processed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-538

In re Applications of

SARASOTA-CHARLOTTE BROADCASTING CORPORATION — File No. BPH-870908MX

SANDPIPER BROADCASTING, INC. — File No. BPH-870910OG

For Construction Permit for a
New FM Station on Channel 290A
in Englewood, Florida

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 1993; Released: August 30, 1993

By the Commission:

1. The United States Court of Appeals for the District of Columbia Circuit remanded this case to the Commission for further proceedings. *Sarasota-Charlotte Broadcasting Corporation* v. *FCC*, No. 91-1186 (D.C. Cir. October 27, 1992). The court held that the Commission erred in finding that Sarasota-Charlotte Broadcasting Corporation's (SCBC) integration proposal was a variance from its application and in refusing to consider that integration proposal. In an Order, FCC 93I-08 (OGC February 25, 1993), the parties were asked to file comments on what action would be appropriate in light of the remand. Now before the Commission are Comments filed March 8, 1993 by SCBC and by Sandpiper Broadcasting, Inc., and Responses filed March 15, 1993 by Sandpiper and by SCBC.

2. The parties agree that the record should be reopened to consider SCBC's integration proposal as documented in SCBC Exhibits 1 and 2. SCBC argues that under 47 C.F.R. § 1.248(d)(4) the Commission can resolve this proceeding on the basis of Exhibits 1 and 2 without further hearings. Section 1.248(d)(4) provides that oral testimony and cross-examination will permitted only where, in the discretion of the ALJ, "material issues of decisional fact cannot be resolved without oral evidentiary hearing procedures or the public interest otherwise requires oral evidentiary proceedings." See also *Proposals to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 157, 162 ¶ 36 (1990). SCBC asserts that Sandpiper has failed to make a showing requiring oral testimony and cross-examination as contemplated by Section 1.248(d)(4) and that the Commission can exercise the authority delegated to the ALJ and resolve this proceeding without a remand. For the reasons set forth below, we believe that this case should be remanded for further proceedings before the ALJ.

3. Initially, we note that SCBC's integration proposal was never evaluated during the course of the proceeding and that there was no requirement for Sandpiper to raise objections to SCBC's integration proposal earlier because the rule at that time placed no obligation on Sandpiper to do so. Moreover, the Review Board has previously observed that there are questions concerning SCBC's entitlement to a daytimer preference and whether the integration proposal of SCBC's 90.2 percent owner was too tenuous to warrant credit. 5 FCC Rcd 3837, 3837 ¶ 2 and 3839 ¶ 9 (Rev. Bd. 1990).

4. Finally, we have considered SCBC's position that this case should be resolved without oral testimony under 47 C.F.R. 1.248. Notwithstanding SCBC's contentions, we believe that a remand would best assist us in the resolution of this proceeding. ALJs, as triers of fact, are experienced in procedural matters, have expertise on questions involving admissibility of evidence, and can most efficiently determine whether oral examination is required. Thus, we believe that the orderly disposition of the Commission's overall responsibilities will be best served by a remand of this proceeding for full consideration of all questions of substantial decisional significance bearing on SCBC's proposal. Sandpiper will be permitted to make a proffer of evidence to establish whether oral testimony and cross-examination are required with respect to all aspects of SCBC's proposal. However, under Section 1.248(d)(4) the ALJ should authorize further oral testimony only on a showing that there are material questions concerning SCBC's proposal or that the public interest otherwise requires oral hearing and cross-examination.

5. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED for further proceedings as set forth in Paragraph 3 above[1] and preparation of a Supplemental Initial Decision on an expedited basis; and that the parties ARE AUTHORIZED to file exceptions to the Supplemental Initial Decision directly with the Commission.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] No further issues are required. The standard comparative issue considered by the ALJ is broad enough to permit full consideration of SCBC's proposal and the ultimate resolution of this proceeding. See *Sarasota-Charlotte Broadcasting Corporation*, 4 FCC Rcd 8106, 8106 ¶ 2 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-344

In Applications of

WILLIAM L. CARROLL File No. BPH-8808160A

Michael A. McMurray & Marilyn A. McMurray, A General Partnership d/b/a McMURRAY COMMUNICATIONS File No. BPH-8808160I

For Construction Permit for a New FM Station on Channel 247A, Lebanon, Ohio

ORDER

Adopted: August 20, 1993; Released: August 30, 1993

By The Commission:

1. By this action we deny reconsideration of a Commission Order, *William L. Carroll*, 8 FCC Rcd 814 (1993), and affirm the grant of the application filed by McMurray Communications (McMurray). Now before the Commission is a Petition for Reconsideration filed March 8, 1993 by William L. Carroll (Carroll), an Opposition filed March 23, 1993 by McMurray and a Reply filed April 5, 1993 by Carroll; and a Petition to Reopen Record filed March 8, 1993 by Carroll and an Opposition filed March 17, 1993 by McMurray.

2. Carroll argues in its Petition for Reconsideration that the Commission erred in its assessment of the parties comparative attributes and in finding that McMurray has reasonable assurance of access to its proposed antenna site. Carroll, however has failed to present new facts or changed circumstances which warrant reconsideration as required by 47 C.F.R. § 1.106(b)(2). Carroll's arguments were considered by the Review Board and the Commission. *William M. Carroll*, 7 FCC Rcd 4469 (Rev. Bd. 1992), *review denied* 8 FCC Rcd 814 (1993). Reconsideration will not be granted to debate matters upon which the Commission has already deliberated and spoken. *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied* 383 U.S. 967 (1966). Thus, Carroll's Petition for Reconsideration will be denied.[1]

3. Carroll also petitions to reopen the record for the limited purpose of considering a declaration from Douglas A. Johnson, Deputy Director of Planning and Development for the City of Lebanon. Johnson states that McMurray's proposed antenna tower exceeds the height limitations allowed in the city ordinances and that it is unlikely that the criteria for a variance could be met.

4. The Petition to Reopen is procedurally deficient. A petition to reopen the record after the close of the hearing must show: (1) that it relies on new or newly discovered evidence that could not, through the exercise of due diligence, have been discovered earlier; (2) that the new evidence, if proven, would raise a substantial and material question of fact affecting the ultimate outcome of the proceeding; and (3) that there is a substantial likelihood of proving the potentially disqualifying allegations if the case were remanded for further hearings. See *Evergreen Broadcasting Company*, 7 FCC Rcd 6601, 6602 ¶ 8 (1992). Carroll has not shown, or even tried to explain, why it could not have presented Johnson's declaration earlier in this proceeding. The declaration does not contain new information and is repetitive of Johnson's prior declarations. Motion to Reopen the Record and Enlarge Issues, Exh. 1, filed February 28, 1991 by Julia A. Moore; and Opposition, Exh. 8 filed March 13, 1991 by McMurray.

5. Johnson's representations also do not raise a question warranting further proceedings concerning McMurray's access to its proposed antenna site. Johnson previously conceded that his analysis is a recommendation, that the Board of Zoning Appeals has authority to grant dimensional variances and to approve nonconforming uses, and that the Board of Zoning Appeals has approved variances despite staff recommendations against a variance. McMurray Opposition Exh. 8, filed March 13, 1991. Moreover, zoning matters are of local concern and must be resolved by local authorities and not the Commission. Absent a showing to the contrary, the Commission assumes that variances will be approved and that zoning will be granted. Thus, the Commission will not designate issues involving zoning questions absent a reasonable showing that an applicant will not be able to obtain prior authorization for its proposed construction. *Warren Price Communications, Inc.*, 7 FCC Rcd 4344, 4345 ¶ 7 (1992). The Commission will only designate a zoning issue on a showing that "a majority of the members of the applicable governing board are not in favor of granting an authorization or variance for construction of the broadcast tower" or antenna. *Kenter Broadcasting Co.*, 62 RR 2d 1573, 1578 (1986), citing *Edward G. Atsinger*, 29 FCC 2d 443, 451 (Rev. Bd. 1971). Carroll has not alleged or shown that a majority of the Board of Zoning Appeals would deny authority for McMurray's proposed tower. Thus, Carroll has not presented a basis for reopening the record and the Petition to Reopen will be denied.

6. ACCORDINGLY, IT IS ORDERED That the Petition for Reconsideration and the Petition to Reopen the Record both filed March 8, 1993 by William L. Carroll ARE DENIED.

[1] Carroll argues the Board failed to fully credit his civic activities. However, as the Board noted, even fully crediting those civic activities, McMurray is entitled to a dispositive integration preference based on its local residence and civic activities. 7 FCC Rcd at 4472 ¶ 29. McMurray Exh. 2 pp. 7-9 and Exh. 3 pp. 6-10; and Carroll Exh. 1 p. 2.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

RDH COMMUNICATIONS, LIMITED PARTNERSHIP — File No. BPH-881215NG

For Construction Permit
for a New FM Station on Channel 297A
in Baker, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 1993; Released: August 30, 1993

By the Commission:

1. By Memorandum Opinion and Order in *RDH Communications, Limited Partnership*, 6 FCC Rcd 4764 (1991), we denied a petition for reconsideration filed by RDH Communications, Limited Partnership ("RDH"). That order affirmed the action of the Mass Media Bureau dismissing RDH's application pursuant to the FM "hard look" processing rules, 47 C.F.R. §§ 73.3564(a), 73.3573(g) (1991). The application did not contain the financial certification page and, therefore, was unacceptable for tender. Subsequently, we denied RDH's petition for reconsideration of that order. *RDH Communications, Limited Partnership*, 7 FCC Rcd 5564 (1992) (*"RDH II"*).[1] Now before the Commission for consideration is a "Petition for Further Reconsideration," which RDH filed on September 30, 1992.

2. IT IS ORDERED, That, pursuant to Sections 1.106(b)(2) and 1.115(g) of the Commission's Rules, the petition for further reconsideration filed on September 30, 1992, by RDH Communications, Limited Partnership IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] To avoid undue disruption of our processes and the consequent harm of delayed initiation of service to the public, we declined to apply the modified "hard look" rules to applications, such as RDH's, that were filed prior to the August 7, 1992 effective date of the modified rules. *Report and Order*, MM Docket No. 91-347, 7 FCC Rcd 5074, 5079 (1992). *See RDH II*, at n.1.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

JERSEY SHORE BROADCASTING CORPORATION — File No. BPH-900117MY

PRESS BROADCASTING COMPANY (formerly LD Broadcasting L.P.) — File No. BPH-900117NA

For Construction Permit for a
New FM Station on Channel 289B1
at Manahawkin, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 1993; Released: August 30, 1993

By the Commission:

1. The Commission has before it for consideration petitions for reconsideration filed on December 7, 1992 by Jersey Shore Broadcasting Corporation ("Jersey") and Press Broadcasting Company ("Press"). Petitioners request reconsideration of our order granting an application for review filed by Seashore Broadcasting Corporation and vacating the Mass Media Bureau's ("Bureau") approval of the portion of a settlement agreement which had been erroneously referred to it. *Memorandum Opinion and Order*, 7 FCC Rcd 7205 (1992) (*"MO&O"*).

2. In MM Docket No. 91-208, the Manahawkin, New Jersey comparative proceeding, the presiding Administrative Law Judge approved the principal portion of a settlement agreement and referred the remaining portion which involved the captioned applicants to the Bureau. However, on review, the Commission disapproved of the entire agreement because the participation of those applicants was barred by proper application of the inconsistent application rule, 47 C.F.R. § 73.3518. *Atlantic Radio Communications*, 7 FCC Rcd 5105 (1992). Subsequently, in the *MO&O*, the Commission vacated the Bureau's grant of the portion of the agreement referred to it in order to be consistent with *Atlantic Radio*.

3. Subsequently, Jersey and Press filed petitions for reconsideration of both *Atlantic Radio* and the *MO&O*. The instant petitions mirror the arguments set forth in the *Atlantic Radio* petitions for reconsideration. By Order released March 5, 1993, we denied the latter petitions. *Atlantic Radio Communications*, 8 FCC Rcd 1383 (1993). Therefore, the Commission shall deny the petitions for reconsideration of the *MO&O*.

4. ACCORDINGLY, IT IS ORDERED, That the petitions for reconsideration filed on December 7, 1992 by Jersey Shore Broadcasting Corporation and Press Broadcasting Company ARE DENIED.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 11, 1993

Released: August 12, 1993

Mr. John Schmidt
330 Minnesota, Apartment 2
Lawrence, Kansas 66044

In Reply Refer to:
1800B3-KEH

In re: WHB, Kansas City, Missouri
Assignments of License
BAL-930510GE

Dear Mr. Schmidt:

This is in reference to the letter of June 21, 1993 that you wrote to Ms. Edythe Wise, Chief of the Complaints and Investigations Branch, Enforcement Division, within the Federal Communications Commission. Since the nature of your complaint concerns issues that come under the purview of the FM Branch in the processing of the above-captioned assignment applications, Ms. Wise has referred your letter to our office.[1]

In the objection, you indicate that you are concerned that the station's new owners will alter its current format and that "Kansas City has simply got too many country radio stations." With respect to your concern regarding the proposed assignee's programming plans, please be advised that the Commission does not scrutinize or regulate programming formats, nor does it take programming format into consideration in making its licensing decisions. In 1976, the Commission issued a Policy Statement in which it concluded that review of program formats was not required by the Communications Act, would not benefit the public, and would deter innovation, as well as impose substantial administrative burdens on the Commission. *Entertainment Formats*, 60 FCC 2d 858 (1976), *reconsideration denied*, 66 FCC 2d 78 (1977). The Supreme Court of the United States has upheld this policy and the Commission's determination that "the public interest is best served by promoting diversity in entertainment formats through market forces and competition among broadcasters ...." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 585 (1981). *See also, Riverside Broadcasting Co., Inc.*, 53 RR 2d 1154 (1983), *reconsideration denied*, 56 RR 2d 618 (1984), *remanded on other grounds sub nom., Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392 (D.C. Cir. 1985).

Accordingly, your letter of June 21, 1993, objecting to the applications for assignment of license of WHB IS HEREBY DENIED. Furthermore, we hereby find that the assignment of license for Station WHB, Kansas City, Missouri from Shamrock Broadcasting, Inc. to Apollo Radio of Kansas City, Inc. (File No. BAL-930510GE) and would serve the public interest, convenience and necessity, and IS HEREBY GRANTED.[2]

Sincerely,

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

cc:
William L. Stakelin
Karen Merrell
Barbara Gardner, Esq.
Kevin Boyle, Esq.

[1] We note that there is currently pending an application to assign station WHB from Apollo Radio of Kansas City, Inc. to KANZA, Inc., File No. BAL-930602EA.

[2] The concomitant application to assign the license and sell the assets of Station KUDL(FM) from Shamrock Broadcasting, Inc. to Apollo Radio of Kansas City, Inc. (File No. BALH-930510GF) is being granted simultaneously herewith.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-226

In re Applications of

SALTAIRE COMMUNICATIONS, INC.	File No. BPH-880229NG
CHARLES S. FITCH, P.E.	File No. BPH-880301NW
WHSL CORPORATION	File No. BPH-880301OF

For Construction Permit for
New FM Station, Channel 299A,
Pawcatuck, Connecticut

MEMORANDUM OPINION AND ORDER

Adopted: August 23, 1993; Released: August 30, 1993

By the Commission:

1. On April 5, 1993 the WHSL Corporation filed a petition for reconsideration of the Commission's denial of its appeal from the Review Board's decision to grant the competing application of SaltAire Communications, Inc. *SaltAire Communications, Inc.*, 8 FCC Rcd 1385 (1993).[1]

2. The petition is subject to dismissal because, as SaltAire points out in opposition, it is not based on any event or change of circumstances that occurred since the petitioner filed its application for review, nor is it based on facts previously unknown that the petitioner could not have discovered earlier through due diligence. See 47 C.F.R. §1.106(b)(2). Nevertheless, brief comment is warranted on several points.

3. WHSL complains that the Review Board wrongly found that the "participating notes" held by three investors barred WHSL's voting stockholder from issuing more stock to raise capital for the firm without the noteholders' consent, whereas in fact the notes merely barred the issuance of stock with rights preferential to those of the noteholders. This objection mischaracterizes the Board's decision. The Board did not say that the notes expressly barred WHSL from issuing new stock without the noteholders' consent; it found, rather, that "[a]s a practical matter" WHSL was powerless to raise capital by selling stock. 7 FCC Rcd at 5166 ¶12. That finding is fully justified, because the noteholders' extensive rights to earnings and assets leaves the voting stockholder with little of value to offer as an inducement for capital contributions from new investors. We agree with the Board that the stockholder's dependency on the noteholders' cooperation for further funding gives the latter power to influence management of the corporation's affairs.[2]

4. WHSL argues that the grant of rights to the noteholders was a legitimate safeguard that any prudent lender would have demanded and that if the noteholders had not insisted upon it the Commission might well have concluded that the ostensible terms of financing were too liberal to be believed, as was found in *KIST Corp.*, 102 FCC 2d 288 (1985). Hence, WHSL contends that the Board's decision is inconsistent with *KIST*. We see no such inconsistency. There is a vast middle ground between the extraordinarily liberal financial terms considered in *KIST* and the extremely burdensome contractual rights of the noteholders in this instance, and holding that an arrangement at one extreme isimplausibly generous does not logically preclude holding that an arrangement at the other extreme gives inappropriate control to so-called creditors.

5. WHSL also argues that affirmance of the adverse ruling on its integration proposal would disserve the public interest by deterring future applicants, particularly minority-owned applicants, from relying on an innovative method of financing. Neither we nor the Board have suggested, though, that there is anything inherently improper about financing by means of participating notes or that control or active involvement will invariably be imputed to investors who hold them. We merely decide here that an integration proposal predicated on non-involvement by participating noteholders merits no credit if the noteholders have controlling power over the applicant's nominal principal.

6. ACCORDINGLY, IT IS ORDERED that the petition for reconsideration filed on April 5, 1993 by WHSL Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[1] SaltAire filed an opposition to the petition on April 15, 1993, and WHSL filed a reply on April 30, 1993. Charles S. Fitch, P.E. did not file either a petition for reconsideration or a notice of appeal to the Court of Appeals, and hence the denial of his application is final.

[2] It is far from clear that WHSL would deserve all the integration credit it claims, even if the noteholders had no such control over its financing, given the legal services provided by one individual and the participation of all three individuals as directors and officers. Although they style themselves as mere creditors, the participating noteholders have the same essential prerogative of ownership that non-voting stockholders and limited partners enjoy: to wit, they have a *perpetual* right to a share of earnings, a right that, unlike the reimbursement rights of ordinary creditors, is not subject to curtailment through a discharge of indebtedness while the corporation remains in business. Having affirmed the denial of integration credit on other grounds, however, we need not resolve the question of whether they should therefore be regarded as owners for purposes of integration assessment and, if so, whether any of their actions contravened the "no material involvement" standard applicable to passive owners. See 7 FCC Rcd at 5167 ¶ ¶13 -14 and n.14.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

QUINNIPIAC COLLEGE File No. BPED-841031IG
Hamden, Connecticut

For a Construction Permit
to Modify the Facilities of
Noncommercial Educational
FM Station WQAQ

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 1993; Released: August 30, 1993

By the Commission:

1. The Commission has before it the Application for Review filed on December 5, 1988, by Quinnipiac College ("Quinnipiac") the licensee of noncommercial educational ("NCE") FM station WQAQ, Hamden, Connecticut. Quinnipiac seeks review of the action of the Chief, FM Branch, Mass Media Bureau ("Bureau"), denying its short-spacing waiver request and dismissing the captioned application.

BACKGROUND

2. Quinnipiac operates WQAQ as a Class D NCE FM station with 16 watts effective radiated power ("ERP"). Quinnipiac seeks to increase its power to 100 watts so that it can upgrade the station to Class A status. Quinnipiac originally filed an application in March 1980 to change its operation from Channel 202D to Channel 251D. Later, however, Quinnipiac filed a major amendment to specify its existing channel (202) with Class A facilities (100 watts ERP). That proposal was given a new file number and is currently before the Commission.

3. Quinnipiac's presently licensed Class D facility is at a site located 4.8 kilometers from FM station WPLR, New Haven, Connecticut. WPLR operates on FM Channel 256, which is intermediate frequency ("IF")-related to Channel 202.[1] As a Class D facility, WQAQ currently violates no rule section since Class D stations outside of the Mexican Border zone do not have IF spacing requirements.[2] However, Quinnipiac's proposal to increase its ERP to 100 watts would violate the IF spacing requirements of Section 73.207(a). This Section mandates that a spacing of 14 kilometers be maintained between WPLR and WQAQ if WQAQ is operated as a Class A facility.[3]

4. In denying Quinnipiac's waiver request, the Bureau stated that the facts and circumstances set forth by Quinnipiac were insufficient to justify the requested short-spacing. *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). The Bureau stated that showings such as Quinnipiac's, which were based on contour overlap, were irrelevant. The Bureau also stated that the case cited by Quinnipiac, where a similar short-spacing waiver was granted, was not a valid precedent.

DISCUSSION

5. In its application for review, Quinnipiac argues that it has been treated unfairly by the Commission. Quinnipiac states that its problems began in 1979 when the Commission promulgated certain changes in the rules pertaining to Class D FM stations. *See Changes in the Rules Pertaining to Noncommercial Educational FM Broadcast Stations*, 70 FCC 2d 972 (1979) (*"Educational FM Changes"*). Class D stations were given several alternatives including: (1) moving to open space on commercial channels; (2) moving to newly created FM Channel 200; (3) moving to the least preclusive noncommercial channel. Contrary to Quinnipiac's assertion, Class D stations were not ordered to upgrade their stations to Class A status on existing frequencies. Rather, the Commission stated that it "has no desire to terminate the operation of 10-watt stations, and as explained above in footnote 11, Section 73.512 needs to be clarified to make it clear that the Commission has taken every possible step to protect the ability of these stations to continue their operation." *Educational FM Changes*, 70 FCC 2d at 980.

6. Quinnipiac claims that it was "prodded" and "urged" by the Commission to abandon its initial request to change channel and instead seek the instant power increase on its present channel. On Channel 251D, WQAQ's original application (then assigned File No. BPED-800304AK) was mutually exclusive with the application of another NCE station (WEBR, Wallingford, Connecticut). In such situations, it is standard Bureau procedure to notify the applicants of the mutually exclusive situation and invite them to amend to eliminate the conflicts and, thus, avoid a comparative hearing. Quinnipiac chose to avoid a com-

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[1] Two FM stations are considered to be IF-related when their assigned frequencies are separated by 10.6 or 10.8 MHz (53 or 54 channels). IF interference to FM broadcast receivers causes increased background noise which degrades reception of a desired signal. In more severe cases, it is characterized by reception of the audio, often distorted, of one or both of the two stations, regardless of the position of the receiver's tuner dial. Thus, when it occurs, this phenomenon can prevent reception by the affected receiver of most, or all, of the FM stations in the area. *See Report and Order* in Docket No. 15934, 45 FCC 2541 (1965).

[2] When the IF spacing provisions of Section 73.207(a) of the Commission's Rules were adopted, the Commission stated that with respect to Class D NCE FM stations "[w]e do not expect ... that there will be the same [IF interference] problem with the 10 watt educational stations and are not proposing any mileage separation rules for these stations." *Report and Order* in Docket No. 15934, 45 FCC at 2542. Class D IF situations are handled on a case-by-case basis.

[3] At the time Quinnipiac's application was dismissed, the spacing requirement between WPLR and WQAQ was 16 kilometers. This IF spacing requirement was later modified to 14 kilometers, a distance consistent with preventing overlap of the predicted 36 mV/m median field strength contours of the respective stations. *See Third Report and Order* in MM Docket No. 86-144, 4 FCC Rcd 3557 (1989).

parative hearing. Quinnipiac was not coerced by the Bureau into filing any amendment to vacate its original proposal on Channel 251D.

7. Additionally, Quinnipiac argues that it was "treated shabbily" because the staff requested two different amendments to demonstrate compliance with the Channel 6 interference rules. However, just prior to the time that the staff requested the Channel 6 interference amendments from WQAQ, the Commission had promulgated new rules (47 CFR Section 73.525) concerning such interference. *See Memorandum Opinion and Order* in Docket 20735, 58 RR 2d 629, 50 Fed. Reg. 27954 (1985). These rules, which became effective on June 27, 1985, applied to all applications for construction permits, including those already on file. Therefore, the staff directed deficiency letters to all pending NCE applicants (including Quinnipiac) to require amendments demonstrating that the pending proposals met the rule. Since compliance with the new rule section required many applicants to make substantive engineering changes in their respective applications, other potential deficiencies were not addressed at that time. Quinnipiac's application was processed in a manner consistent with all other NCE FM applications. Moreover, the Bureau's actions were reasonable in light of regulatory changes which were occurring at that time.

8. Quinnipiac next contends that the Bureau did not give its waiver request the "hard look" mandated by *WAIT Radio v. FCC*, 418 F.2d 644 (D.C. Cir. 1969). It contends that the Bureau should have considered the "anomalous facts" in the instant case, rather than applying the usual criteria established by the Commission for considering short-spacing requests. Quinnipiac faults the Bureau for rejecting its argument that "in reality there would be no interference" caused by the short-spacing between WQAQ and WPLR. However, Quinnipiac has offered absolutely no evidence that interference would not occur if it increased its power from 16 watts ERP to 100 watts ERP, other than its own speculation that it was "extremely unlikely." Moreover, just because no interference complaints have been received while WQAQ has operated as a Class D station does not mean that no interference would be caused if the power were significantly increased as proposed.

9. Quinnipiac argues that Section 73.207 of the Rules should not necessarily apply to all NCE FM stations. Rather than use the minimum station separation requirements of this Rule, it suggests that field strength contours should be used to determine whether actual IF interference would occur. However, even Quinnipiac admits that there is a contour overlap between WQAQ and WPLR.[4] Thus, it can not argue that there will be no contour overlap.

10. Quinnipiac also argues that the Commission should change its policy and consider IF short-spacing waiver requests for 100 watt Class A NCE FM stations the same way it considers such waiver requests for Class D NCE FM stations, *i.e.*, on a case-by-case basis. A proposal similar to this was considered and rejected by the Commission in the *Third Report and Order* in MM Docket No. 86-144, 4 FCC Rcd 3557 (1989). Moreover, as Quinnipiac concedes, the purpose for its proposed increase to 100 watts is to gain protected status as a Class A FM station. However, in order for a Class D FM station to achieve this protected status, it must comply with the appropriate Commission rules for Class A stations. *See Educational FM Changes*, 70 FCC 2d 972. If Class D FM stations, such as WQAQ, are unable to increase their power to 100 watts and comply with applicable Commission rules, they may remain as secondary Class D FM stations and continue to provide the service they have always provided unless and until it causes interference to another primary NCE station. Thus, the denial of Quinnipiac's application will not preclude it from continuing its present operation.

11. Quinnipiac next argues that grant of its waiver request and application would be consistent with precedent established in a similar situation involving WCRX, Chicago, Illinois. In that case, WCRX was granted a construction permit (BPED-791228AM) to operate with 100 watts ERP despite being located only 3.6 kilometers from the station with which it had the IF problem. Quinnipiac claims that the Bureau provided no justifiable explanation for treating it differently from WCRX.

12. We agree with the Bureau that the WCRX case is not valid precedent in support of Quinnipiac's waiver request. It appears that the application of WCRX was granted in violation of the IF spacing requirements of Section 73.207 without a proper waiver showing. However, the Commission is not required to treat as binding precedent waivers granted by staff action. *North Texas Media, Inc. v. FCC*, 778 F.2d 28 (D.C. Cir. 1985). Specifically, we have held that prior erroneous grants of waivers of IF spacing deficiencies by the staff, in the absence of a threshold showing, will be given no precedential weight. *Walter P. Faber, Jr.*, 4 FCC Rcd 5492, 5493 (1989), *recon. denied*, 6 FCC Rcd 3601 (1991), *aff'd sub nom. Walter P. Faber, Jr. v. FCC*, No. 91-177 (D.C. Cir. June 4, 1992); *Edens Broadcasting, Inc. (WRBQ-FM)*, 5 FCC Rcd 2576, 2578 (1990), *recon. denied*, 6 FCC Rcd 4327 (1991). The Commission has now clearly stated the criteria for waivers of IF spacing deficiencies and may apply these criteria to pending applications. *See Walter P. Faber, Jr. v. FCC, supra.* Accordingly, the WCRX case is of no precedential value.

13. Quinnipiac's final argument is that it meets the standard criteria for granting short-spacing waivers. In this regard, it seeks to submit an engineering showing with its Application for Review to make, for the first time, the threshold showing required for a short-spacing waiver. However, Section 1.115(c) of the Commission's Rules provides that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." Quinnipiac's attempt to submit new engineering information along with its application for review without affording the Bureau an opportunity to consider the new factual questions violates this rule provision. *See Kenny D. Hopkins*, 5 FCC Rcd 604 (1990). While Quinnipiac could have submitted new engineering information to the Bureau in connection with a petition for reconsideration, see Note to Section 1.115(c), it chose not to do so. Accordingly, its threshold showing in connection with its waiver request remains defective.

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[4] At the time Quinnipiac filed its Application for Review, the IF-related spacing requirements in Section 73.207 were based on preventing an overlap of the relevant stations' 20 mV/m median field strength contours. The distance separation requirements were subsequently changed to prevent overlap of the predicted 36 mV/m contours. Because WQAQ's 36 mV/m contour is completely encompassed by WPLR's 36 mV/m contour, overlap will exist.

14. Even if we were to consider Quinnipiac's new engineering submission, we would still conclude that it has not justified a waiver of the Commission's IF spacing requirements. Quinnipiac has failed to meet the threshold test for an IF short-spacing waiver. Quinnipiac admits that its present site is suitable for continued operation with its currently licensed facilities. Quinnipiac has based its desire to increase class, in part, on its concern about the *potential* for service disruption from or to a future primary NCE station. Such speculation is an insufficient justification to create an IF short-spacing violation.

15. Quinnipiac also has failed to demonstrate that no fully spaced sites are available or that its site is the least short-spaced site available. Quinnipiac contends that it is restricted from moving to the northeast by WESU, Middletown, Connecticut, and to the south-southwest by WNHU, West Haven, Connecticut. Quinnipiac also claims to have considered, and rejected, other lesser short-spaced sites because of cost or because the topography would cause shadowing of WQAQ's signal on the Quinnipiac College campus. However, no data was provided to support these claims. Quinnipiac also argues that moving the WQAQ site away from Hamden to avoid short-spacing would preclude it from covering its community of license with a 1 mV/m contour. However, there is no city coverage requirement for NCE FM stations. Based on this meager showing, Quinnipiac has not demonstrated that lesser short-spaced sites are not available.

16. In addition to failing to meet the threshold test, Quinnipiac has failed to show that a grant of its waiver request would serve the public interest. *See Third Report and Order* in MM Docket No. 86-144, 4 FCC Rcd at 3563, n.21. Quinnipiac's mere desire to increase power and coverage is not a valid public interest factor which would warrant the waiver. *Board of Education of the City of Atlanta (WABE-FM)*, 82 FCC 2d 125, 127 (1980). *See also, Walter P. Faber, Jr.*, 4 FCC Rcd at 5493. Finally, Quinnipiac concedes that there would be overlap of the 36 mV/m contours of WQAQ and WPLR. Thus, even after the Commission relaxed the IF separation requirements, based on use of 36 mV/m contours, the Quinnipiac proposal is still significantly short-spaced and would create the type of overlap the rules are designed to avoid. *Third Report and Order* in MM Docket No. 86-144, *supra*. Quinnipiac's claim that no interference will occur, supported only by its bare speculation, is not persuasive.

17. ACCORDINGLY, IT IS ORDERED that the application for review filed by Quinnipiac College IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-358

In the Matter of

Amendment of Part 22 of the
Commission's Rules Relating
to License Renewals in the
Domestic Public Cellular Radio
Telecommunications Service

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 1993; Released: August 31, 1993

By the Commission:

1. In this Memorandum Opinion and Order, we deny a petition for reconsideration of our *Memorandum Opinion and Order on Reconsideration* (*MO&O*) in this proceeding, 8 FCC Rcd 2834 (1993), filed May 26, 1993, by Telecommunications Research and Action Center and the Washington Citizens Coalition Interested in Viewers Constitutional Rights (collectively "TRAC").[1] TRAC argues that our two-step procedure for cellular license renewals is inconsistent with Section 309 of the Communications Act of 1934, as amended. We disagree.[2]

2. In our *MO&O*, we set forth in detail our analysis of why we believe our two-step process for cellular renewals is lawful. For the reasons discussed in the *MO&O*, we continue to believe that the D.C. Circuit's decision in *Citizens Communication Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972) (*Citizens*), can be distinguished or, alternatively, that the court can be persuaded to overturn it.[3] Nothing in TRAC's petition changes our views regarding this legal issue. We recognize, as we said in our *Report and Order* in this proceeding, 7 FCC Rcd 719, 725-26 (1991), that the decision in *Hispanic Information & Telecommunication Network v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989), "does not appear to overrule *Citizens*" or itself specifically allow a two-step renewal proceeding. Nevertheless we continue to believe, as we stated in the *MO&O*, 8 FCC Rcd at 2838-39, that this and other recent case law "takes a broader view of agency authority to adopt public interest-based eligibility standards," that the reasoning of these cases undercuts the rationale of *Citizens*, and that, in light of this case law, the court "can be persuaded to overrule *Citizens* (if it decided that the case is applicable to cellular renewal hearings)."

3. We also take this opportunity to stress one additional point that may alleviate some of TRAC's underlying concerns. Even if the court overrules *Citizens* and thereby eliminates any legal bar to adoption of a two-step renewal procedure in the broadcast service, it does not follow that the Commission would necessarily adopt a two-step renewal procedure for broadcast stations. That policy issue is simply not before the Commission in this proceeding and it should not be inferred that we have reached a decision on it.

4. Accordingly, IT IS ORDERED THAT the Petition for Reconsideration filed May 26, 1993 by Telecommunications Research and Action Center and the Washington Citizens Coalition Interested in Viewers Constitutional Rights IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] Responsive pleadings were filed by U S WEST NewVector Group, Inc.; The Cellular Telecommunications Industry Association; Southwestern Bell Mobile Systems, Inc.; McCaw Cellular Communications, Inc.; GTE Corporation, GTE Mobilnet Incorporated and Contel Cellular Inc. (collectively "GTE"); and BellSouth Corporation, BellSouth Enterprises, Inc., and BellSouth Cellular Corporation (collectively "BellSouth"). TRAC filed a reply to the foregoing pleadings. We will address two other petitions for reconsideration dealing with various implementation aspects of our procedures for comparative cellular renewal proceedings in a separate order at a later date.

[2] Some of the opponents of TRAC's petition for reconsideration argue that TRAC lacks standing, citing, *inter alia*, cases involving standing under Article III of the Constitution. It is well-established that the fact that an agency considers an entity's arguments does not mean the entity has standing to seek judicial review under Article III. *See, e.g., California Ass'n. of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985).

[3] In light of *Citizens*, we stayed our two-step procedure pending judicial review.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MARCO COMMUNICATIONS CORP. File No. 10364-CL-P-611-A-89

For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market 611, Oregon 6 (Crook)

MEMORANDUM OPINION AND ORDER

Adopted: August 17, 1993; Released: August 31, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Marco Communications Corp. (Marco) was selected as the winner in the "re-lottery" for the above-captioned Rural Service Area (RSA) non-wireline cellular frequency block. The Mobile Services Division had dismissed the application of Silver Wings 1988 L.P. (Silver Wings), which was the original lottery winner for Market 611, as unacceptable for filing under the alien restrictions of Section 310(b) of the Communications Act of 1934, as amended (the Act).[1] In this Order, we dispose of a "Petition To Deny Or, In The Alternative, To Condition Grant" filed by Silver Wings and a Petition to Deny filed by Catherine L. Waddill[2] against Marco's application. For the reasons stated in this Order, we deny the foregoing petitions and grant Marco's application.

II. PLEADINGS; DISCUSSION

A. Ownership Allegations

2. Section 22.921(b)(1) of the Commission's Rules prohibits any party to a non-wireline application from having any direct or indirect ownership interest in more than one application for the same RSA market. Marco and Florida Cellular Mobil Communications Corp. (Florida Cellular) have filed cellular radio applications for the Block A cellular frequencies in RSA Market 611. Based upon the original (*i.e.*, unamended) applications filed by Marco and Florida Cellular, Ms. Waddill alleges that Richard Finn owns 0.03 percent of Marco, while Richard and Susan Finn jointly own 0.43 percent of Florida Cellular. Ms. Waddill claims that the cross-ownership interest of Richard Finn in the applications of Marco and Florida Cellular renders Marco's application fatally defective because it violates the provisions of Section 22.921(b)(1).[3] Ms. Waddill argues that Marco's application should therefore be dismissed as defective, citing *Florida Cellular Mobil Communications Corp.*, 6 FCC Rcd 6910 (1991) and *Progressive Cellular III B-3*, 6 FCC Rcd 596 (Mobile Serv. Div. 1991).

3. Silver Wings also argues that Marco's application should be dismissed as defective because it violates the cross-ownership restrictions in Section 22.921(b)(1). Silver Wings observes that Marco's original application reported 17 shareholders, but that Marco amended its application on May 7, 1992, by submitting a corrected list of 18 shareholders. Silver Wings notes that the May 7, 1992 amendment includes a declaration under penalty of perjury from Peter Thomas Smith, who served as Marco's corporate attorney at the time it filed its application. In that declaration, Mr. Smith explains that the original list submitted with Marco's application incorrectly included three individuals as shareholders who previously had transferred their shares to other persons. He claims that these errors were due to an "inadvertent clerical mistake."[4] Silver Wings asserts that three persons with the surname of "Finn" were included in the original list of shareholders but were deleted from the amended list of May 7, 1992. These persons are John Finn, Donald Finn, and Richard Finn and have been labelled as the "deleted Finns" by Silver Wings. In addition, Silver Wings observes that four people were listed as Marco shareholders for the first time in the amendment of May 7, 1992: Diane Finn, Joseph Finn, Karen Finn, and Susan Finn. These latter persons have been labelled the "added Finns" by the petitioner. Silver Wings notes that Beverly Finn, who is the acting Secretary of Marco, submitted an affidavit with the May 7, 1992 amendment explaining that the revised shareholder list accurately reflects the number

[1] The Commission upheld the dismissal in *Continental Cellular*, 6 FCC Rcd 6834, *Erratum*, 6 FCC Rcd 7205 (1991). The United States Court of Appeals for the District of Columbia Circuit affirmed our decision in *Moving Phones Partnership L.P. v. FCC*, No. 91-1611 (D.C. Cir. July 30, 1993).

[2] Ms. Waddill is a principal of 50 States Cellular Partnership, which is an applicant (Fee No. 9838788) for RSA Market No. 611 (Oregon 6 - Crook).

[3] Ms. Waddill observes that Mr. Finn's address is listed differently in the two applications. Thus, Marco's application lists Mr. Finn as residing at "RFD #2" whereas the street address listed in Florida Cellular's application is "8 Shannon Lane." Both addresses list "Sycamore, Illinois 60178" as the city, state, and zip code in which Mr. Finn resides. Ms. Waddill suggests that Marco listed different street addresses in an attempt to conceal Mr. Finn's ownership interests in competing applications. This allegation is not supported by a statement of a person with personal knowledge concerning the allegation, as required by Section 309(d) of the Communications Act of 1934, as amended, and Section 22.30 of the Commission's Rules. We shall disregard Ms. Waddill's unsubstantiated allegations.

[4] Mr. Smith also observes that the discrepancies in ownership percentages between the corrected list and the erroneous stockholder list included in Marco's original application do not represent changes in the number of shares held by those individuals, but simply erroneous calculations of percentages by the clerk making the tabulations.

of shares actually owned by each Marco shareholder in June 1988 (Marco's application was signed on July 8, 1988) and "at all times subsequent to June 1988."

4. Silver Wings claims that the May 7, 1992 amendment is part of a coordinated effort to conceal a disqualifying violation of Section 22.921(b) of the Commission's Rules, because each of the "deleted Finns" is a principal of Florida Cellular, which also filed an application in Market 611. In addition, Silver Wings asserts that even if the "deleted Finns" were not principals of Marco at the time that Marco's application was filed, Marco is still disqualified because Susan Finn, an "added Finn", has a 0.27778 percent interest in Marco and also holds a 0.38 percent interest jointly with Richard Finn in the Florida Cellular application. Silver Wings also suggests that, in addition to the relationships between the various Finns, there are cross-relationships between other principals of Marco and Florida Cellular which raise questions of common control of the two applications in violation of the Commission's real party-in-interest disclosure rules.[5] Silver Wings notes that Carlen Haigh signed Marco's original application as President of Marco and that Barry C. Haigh, who signed Florida Cellular's application as President, shares a last name and an address with Mary C. Haigh, who is a shareholder of Marco. Further, Silver Wings states that Marco's May 7, 1992 amendment was signed by its current President, Judith Stavrakas, who shares a last name and address with Paul Stavrakas of Florida Cellular. Ms. Stavrakas currently owns 13.89 percent of Marco.[6] In order to clarify the degree of independence of Marco's shareholders, the petitioner suggests that the Commission should require each Marco shareholder (1) to demonstrate that he has financed his participation in Marco's application or reveal the source of his financial support for that participation; and (2) disclose any agreement or understanding regarding his interest in Marco.

5. Section 22.922 of the Commission's Rules prohibits any alienation of ownership interests in a pending RSA cellular application prior to the grant of a construction authorization. Silver Wings claims that the facts and circumstances of Marco's application raise questions of whether any of the Finns transferred ownership interests in Marco during the pendency of Marco's application in violation of Section 22.922 of the Rules. Silver Wings also asks whether the incorrect ownership information in Marco's original application raises questions as to whether the person signing that application actually reviewed the full application prior to certifying the application.[7] The petitioner also questions whether Marco intentionally failed to disclose that John, Donald, Richard, and Susan Finn all have ownership interests in Florida Cellular, especially since cross-ownership interests had resulted in the dismissal of Florida Cellular's application in Market 468, citing *Florida Cellular Mobil Communications Corp.*, 6 FCC Rcd 6910 (1991).[8]

6. In response to the foregoing petitions, Marco states that its present ownership structure was in place before it filed its application in this market, without any prohibited cross-ownership between Marco and Florida Cellular or any other applicant for Market 611. Marco explains that it and Florida Cellular did have small cross-ownership interests in applications for other Metropolitan Statistical Areas (MSAs) prior to 1988 that complied with Commission rules then in effect, which permitted a party in one application to hold an interest of less than 1 percent in another application for the same MSA market. *See* 47 C.F.R. Section 22.921(a) (1983). Marco claims that it made the necessary ownership adjustments for the applications at issue here in early June 1988, in order to comply with the Commission's newly-adopted RSA licensing rule (Section 22.921(b)(1)), which prohibits any party to a non-wireline application for an RSA from having any ownership interest in more than one application for that RSA. *See Amendment of the Commission's Rules for Rural Cellular Service, Third Report and Order*, 4 FCC Rcd 2440, 2442-43 (1988). Marco notes that these ownership changes were legally in effect by the time that Marco's Market 611 application was signed and then filed with the Commission. Marco filed its application on August 11, 1988.

7. To support the foregoing argument, Marco has submitted declarations under penalty of perjury from the "deleted Finns," the "added Finns," and their spouses and relevant corporate officials to demonstrate that Marco has not violated the cross-ownership restrictions of Section 22.921 of the Rules. Thus, John and Donald Finn, two of the "deleted Finns," gave their stock in Marco to their spouses, Diane and Karen, respectively, effective June 11, 1988. John and Donald Finn are stockholders in Florida Cellular, but neither Diane nor Karen Finn has any ownership interest in, or control of, those shares. *See* declarations of Diane, Karen, John, and Donald Finn in Exhibits D, E, F, and G respectively, which are attached to Marco's "Consolidated Opposition to Petitions to Deny" (Opposition), dated August 28, 1992. Further, Richard Finn, one of the "deleted Finns," gave his shares of Marco to his wife, Susan Finn, effective June 11, 1988. *See* Exhibits H and J to

[5] Section 22.13(a)(1) of the Rules requires applicants to disclose fully the real party or parties in interest in their applications. Failure to make such disclosures can result in the return of an application for failure to comply with Commission Rules, pursuant to Section 22.20(a) of the Rules. Thus, failure to reveal a party who had the right to exercise some degree of control over an applicant pursuant to an undisclosed agreement would violate Section 22.13(a)(1).

[6] Silver Wings also notes other potential relationships between relatively minor owners of Marco and owners of Florida Cellular. The persons involved have admitted their relationships, but explained that the Marco owners do not have any ownership interests in Florida Cellular. Thus, Brad Koury owns 2.78 percent of Marco and is married to Lynn Koury, who is a shareholder in Florida Cellular. *See* Exhibit N to Marco's Opposition. Further, Robbie J. Protano owns 1.39 percent of Marco, which he received as a gift from his son Greg Protano, who has held stock in Florida Cellular. *See* Exhibit O to Marco's Opposition. Nicolette Singer, who owns 0.28 percent of Marco, is the daughter of Dale Knutson, who has been a stockholder of Florida Cellular. *See* Exhibit Q to Marco's Opposition.

[7] Section 22.923(b)(7) of the Commission's Rules requires an applicant for a new cellular system in an RSA to sign a transmittal sheet for its application by which it certifies, under penalties of perjury, that the application is complete in every respect, that the applicant is the real party in interest, and that the applicant intends to construct and operate the facilities proposed.

[8] In the cited case, the Commission found that one of Florida Cellular's shareholders, Yerger C. Yandell, was also a partner in Kudzu Cellular Partnership, which was a mutually exclusive applicant in the Maryland 2 market, *i.e.*, Market 468. Because of that cross-ownership interest, the Commission dismissed Florida Cellular's application for violating Section 22.921(b)(1) of the Rules.

Marco's Opposition. Although Susan Finn at one time held 0.42517 percent of the stock of Florida Cellular, she assigned all of that interest to her husband, Richard Finn, effective June 11, 1988, and has held no interest in Florida Cellular since that date. *See* Exhibits I and J to Marco's Opposition.[9] As to Joseph Finn, who is one of the "added Finns," he and his wife Victoria held a small amount of Florida Cellular stock prior to June 11, 1988, when he gave all of his interst in that stock to his wife. Joseph Finn died in February 1990, but his shares in Marco are still held in his name. *See* Exhibits B and C to Marco's Opposition.[10]

8. Petitioners challenging an application must satisfy a two-pronged test established in Sections 309(d)(1) and (d)(2) of the Communications Act. *See Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988) (*Astroline*). The petitioner first must present "specific allegations of fact sufficient to show... that grant of the application would be prima facie inconsistent with [the public interest, convenience and necessity]," 47 U.S.C. Section 309(d)(1). In conducting its inquiry, the Commission must proceed "on the assumption that the specific facts set forth [in the petition] are true." *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985). If the Commission finds that the petitioner has made a *prima facie* showing that grant of the application would be inconsistent with the public interest, the Commission -- under the second prong of the test -- must then determine whether, "on the basis of the application, the pleadings filed, or other matters which it may officially notice[,]...a substantial and material question of fact is presented." 47 U.S.C. Section 309(d)(2). *See Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987). If the Commission concludes that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it must conduct a hearing in accordance with 47 U.S.C. Section 309(e).

9. In light of the foregoing evidence, we conclude that Marco has not violated the cross-ownership restrictions of Section 22.921 of our Rules. Neither petitioner has supported any of its arguments with any statements from persons with personal knowledge concerning those allegations, as required by Section 309(d) of the Communications Act and Section 22.30 of the Commission's Rules.[11] Thus, petitioners have not adequately supported their allegations and have not made a *prima facie* case for a Section 22.921 violation. *See Arnold L. Chase*, 5 FCC Rcd 1642, 1645-46 (1990). Moreover, even if we were to conclude that they had made a *prima facie* case, we find that, based on the whole record, petitioners have not raised a substantial and material question of fact requiring a hearing. Marco has presented sufficient declarations under penalty of perjury to adequately refute all of the significant arguments made by the petitioners. Thus, we conclude that the Finns who actually held ownership interests in Marco at the time Marco's application was filed did not hold any ownership interests in Florida Cellular at that time. In short, there is no substantial and material question of fact regarding whether there was any prohibited cross-ownership in the applications of Marco and Florida Cellular at the time Marco filed its application.

10. Similarly, Silver Wings's other arguments concerning the possibility that Marco is controlled by undisclosed real parties-in-interest have no merit. The test for determining whether an undisclosed third party is a real party-in-interest is whether the party has an ownership interest in the application or will be in a position to exert actual or potential control of the facility that is the subject of the application. *See, e.g., Brian L. O'Neill*, 6 FCC Rcd 2572, 2574 (1991). The declarations under penalty of perjury submitted by Marco demonstrate that there are no outstanding questions as to the identity of the real parties in interest to Marco's application and that no principals of Florida Cellular have any ownership interest in Marco or will be in a position to exert actual or potential control over Marco's proposed cellular system. In response to Silver Wings's arguments concerning possible cross-ownership between related Marco and Florida Cellular owners (see paragraph 4, *supra)*, Marco has submitted appropriate declarations under penalty of perjury from Judith and Paul Stavrakas, who are married to each other. Their declarations explain that Judith has independent ownership of stock in Marco, while Paul owns stock in Florida Cellular. *See* Exhibits L and M attached to Marco's Opposition. Further, Mary C. Lewis, whose name was Mary C. Haigh in 1983 when she acquired her interest in Marco, states that she has had sole control over her stock in Marco since 1983, and that she has never held stock in Florida Cellular. Ms. Lewis also states that she was formerly married to Barry C. Haigh, who has held stock in Florida Cellular. *See* Exhibit P to Marco's Opposition. Carlen D. Haigh, who currently owns 38.89 percent of Marco, received her shares in Marco in June 1988 as a gift from her husband, who is Barry C. Haigh, but she holds no interest in Florida Cellular. *See* Exhibit W to Marco's Opposition.

11. In this regard, the Commission has explained that family or close personal relationships do not automatically create a presumption of control for purposes of establishing real party-in-interest considerations. *See Virginia Communications, Inc.*, 2 FCC Rcd 1895, 1897 (1987). Silver Wings has not supported any of its arguments with any statements from persons with personal knowledge concerning those allegations, as required by Section 309(d) of the Communications Act and Section 22.30 of the Commission's Rules. Thus, Silver Wings has not adequately supported its allegations and has not made a *prima facie* case for a hearing on real party-in-interest issues. Moreover, even if we were to conclude that Silver Wings had made a *prima facie* case, we find that, based on the whole record, Silver Wings has not raised a substantial and material question of fact requiring a hearing. Silver Wings provides no evidence beyond noting familial relationships to support its real party-in-interest claims. Marco has adequately refuted all of the

[9] Marco admits that Susan Finn was listed as a joint shareholder in Florida Cellular's application for Market 611. Nevertheless, since that application did not win the lottery, Florida Cellular had no opportunity to correct this particular error in that filing. *See* Section 22.918(b) of the Rules, which allows only tentative selectees in RSAs to amend their applications.

[10] Diane, Karen, and Susan Finn and Joseph Finn's estate have ownership interests which total about 4.17 percent of Marco, according to Marco's May 7, 1992 amendment.

[11] Failure to comply with these statutory requirements provides an independent basis to deny the petitions. *See U.S. v. F.C.C.*, 652 F.2d 72, 88-90 (D.C. Cir. 1980).

significant arguments by Silver Wings. Each of the many declarations under penalty of perjury submitted by principals of Marco explains the manner in which the declarant acquired its stock interests, asserts that the declarant is the real owner of the stock, and denies the existence of any agreement or understanding regarding the declarant's stock interest. We therefore conclude that Silver Wings has failed to raise a substantial and material question of fact requiring a hearing on real party-in-interest grounds.

12. Section 22.922 of the Commision's Rules proscribes any alienation of ownership interests in a pending RSA cellular application prior to the grant of a construction authorization. Silver Wings has argued that facts and circumstances surrounding Marco's application raise questions of whether any of the Finns transferred ownership interests in Marco during the pendency of Marco's application in violation of Section 22.922. Again, Silver Wings has not supported its allegations with statements from persons with personal knowledge of these assertions, as required by Section 309(d) of the Communications Act and Section 22.30(a)(3) of the Rules. Thus, Silver Wings has failed to make a *prima facie* case. Given Marco's uncontroverted explanation of its ownership in its Opposition, which is appropriately supported by declarations under penalty of perjury, we have no evidence that any transfer of ownership in Marco occurred after its application was filed. Thus, there is no evidence that Section 22.922 was violated and no grounds for a hearing under the *Astroline* test.

13. Silver Wings has also attempted to raise questions concerning whether Marco's application was properly certified since the shareholders' list submitted with the application was erroneous.[12] Silver Wings has not submitted any statements from individuals with personal knowledge about the certification of Marco's application. Thus, Silver Wings has not made a *prima facie* case. Moreover, there is no evidence that Marco intentionally certified the accuracy of its application while knowing that the application was erroneous.[13] Further, we find that Silver Wings has not raised any questions requiring a hearing under the *Astroline* test. Marco has submitted declarations under penalty of perjury from Peter Thomas Smith, who was the corporate attorney for Marco at the time Marco's application was filed, and from Carlen D. Haigh, who was President of Marco at the time Marco's application was filed and who signed the application. *See* Exhibits K and W, respectively, to Marco's Opposition. These declarations explain that as a result of an earlier review of materials relevant to the application, ownership errors had been identified and a corrected shareholder list had been prepared and communicated to Sachs/Freeman Associates, Inc., who prepared and assembled Marco's application. Nevertheless, by "inadvertent clerical mistake," an erroneous list was included rather than the corrected shareholder list. Carlen Haigh states that she reviewed the application, but was not aware that there were errors in the stockholders' list. Rather, she believed that all necessary corrections had been made. Thus, we conclude that the inclusion of the erroneous ownership data was an oversight, not a willful deception.

14. Applying the *Astroline* analysis to the facts in the case before us, we conclude that there is no need to conduct a hearing to determine whether Marco is qualified to be a Commission licensee. The petitioners have not supported any of their arguments with any statements from persons with personal knowledge concerning those allegations, as required by Section 309(d) of the Communications Act and Section 22.30 of the Commission's Rules, and thus have not made a *prima facie* case. Even if the petitioners have alleged facts sufficient, if true, to show that grant of the subject application would be *prima facie* inconsistent with the public interest, we find that the petitioners have not satisfied the second prong of the *Astroline* test, which requires that a petitioner must present a substantial and material question of fact. Thus, we find that Marco has effectively refuted all of the significant arguments raised by the petitioners.

B. Requests for Conditions

15. In the event that the Commission grants Marco's application, Silver Wings asks that the Commission impose conditions on that grant. We shall deal with the most significant requests seriatim. First, Silver Wings wants a condition stating that the holder of the authorization acknowledges that the authorization is issued in reliance upon the validity of the Commission's action dismissing Silver Wings's application and that said dismissal is under court review. In our *Lottery Notice* (Mimeo No. 21449, released Jan.29, 1992) for the re-lottery of Market 611 and other markets, we stated that we would condition grants of the re-lottery winners' applications "upon the Commission's dismissal action becoming final and no longer subject to judicial review." Therefore, we shall so condition the grant of Marco's application.[14]

16. Second, Silver Wings requests that a condition should be added to provide that if the court remands this case to the Commission, Marco's grant shall terminate immediately upon the issuance of the court's mandate remanding the proceeding. Third, Silver Wings asks that if Marco's grant is terminated pursuant to a court remand as previously requested, that Marco's application should be returned to the general pool of applicants for Market 611, pending disposition of Silver Wings's application on remand. Fourth, Silver Wings requests that if its application is disposed of in an adverse manner on remand, that Marco should be allowed to participate in a re-lottery, but should not have any advantage against any other pending application.

17. We deny all of Silver Wings's requests for conditions except for the condition already promised in our *Lottery Notice*. Our processing of Silver Wings's application in the event of a remand will be determined in large part by the

[12] Silver Wings also questions whether Marco intentionally failed to disclose the facts that John, Donald, Richard, and Susan Finn had ownership interests in Florida Cellular. This argument is without merit because the declarations submitted by the foregoing persons and their spouses establish that none of those persons held interests in more than one application for Market 611 at the time Marco's application was filed. See paragraph 7, *supra*.

[13] *See, e.g., Century Cellunet of Jackson MSA Limited Partnership*, 6 FCC Rcd 6150, para.5 (1991). To find misrepresentation or lack of candor, there must be evidence showing an intent to deceive.

[14] We note, however, that imposition of this conditioning language is not necessary under the law. *See, e.g., Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 735-36 (D.C. Cir. 1976).

terms of the remand order. At this time, however, it is premature and inappropriate for us to consider acting on Silver Wings's requests. *See, e.g., Sunde Cellular Communications, Inc.*, 8 FCC Rcd 502 (Mobile Serv. Div. 1993).

III. ORDERING PARAGRAPHS

18. Accordingly, IT IS ORDERED that the Petition to Deny filed by Catherine L. Waddill and the "Petition To Deny Or, In The Alternative, To Condition Grant" filed by Silver Wings 1988 L.P. in the above-captioned proceeding ARE DENIED, except to the extent indicated in pargraph 15.

19. IT IS FURTHER ORDERED that the application (File No. 10364-CL-P-611-A-89) filed by Marco Communications Corp. IS GRANTED, conditioned upon the Commission's dismissal of the application of Silver Wings 1988 L.P. (File No. 10083-CL-P-611-A-88) becoming final and no longer subject to judicial review. This authorization does not convey to the licensee the right to receive protection from the capture of subscriber traffic, co-channel interference, or first-adjacent channel interference in any area outside of the authorized Cellular Geographic Service Area (CGSA) of this system. Moreover, any facility authorized herein with a service area boundary (SAB) extending into the CGSA of any other operating cellular system on the same channel block, regardless of when such other cellular system was or is authorized, is subject to the following condition: In the event that the licensee of the other cellular system requests that the SAB of the facilities authorized herein be removed from its CGSA, the licensee herein must reduce transmitting power or antenna height (or both) as necessary to remove the SAB from the CGSA, unless written consent from the licensee of the other cellular system, allowing the SAB extension, is obtained.

20. IT IS FURTHER ORDERED that all pending applications which are mutually exclusive with the above-captioned application of Marco Communications Corp. and are listed in the *Lottery Notice* (Mimeo No. 21449), released January 29, 1993, and the *Second Addendum* thereto (Mimeo No. 22362), released March 24, 1992, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Tri-State
Inspirational Broadcasting
Corporation, Inc.
Licensee, Station WBHL-FM
Florence, Alabama

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: August 24, 1993; Released: August 31, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) A Memorandum Opinion and Order, 8 FCC Rcd 157 (1993), assessing a forfeiture of five thousand dollars ($5,000) against Tri-State Inspirational Broadcasting Corporation, Inc. (Tri-State), licensee of non-commercial Station WBHL-FM, Florence, Alabama, for violation of Section 399B of the Communications Act of 1934, as amended,[1] and (2) a Petition for Reconsideration, filed February 4, 1993, by Tri-State.

2. In seeking reconsideration, Tri-State challenges both the adequacy of the notice provided it and our failure to reduce or rescind the original forfeiture in light of its showing of financial hardship. The first of these arguments is easily dismissed. Tri-State urges that it was improperly penalized for violation of a policy, as opposed to a rule, citing language in the Memorandum Opinion and Order to the effect that Tri-State had repeatedly violated Section 399B of the Communications Act of 1934, as amended, "and related rules and policies governing donor and underwriting announcements...."[2] It is clear in the context of the Memorandum and Order, however, that the conduct in question violated applicable statutes and rules; this is not a case where policy alone was at issue.

3. As for the assertion that Tri-State lacked adequate notice of the type of conduct proscribed, Sections 399B of the Communications Act of 1934, as amended, and 73.503(d) of the Commission's Rules, read in conjunction with the documents listed in the Note to Section 73.503, provide considerable guidance for non-commercial educational FM stations. The assertion of unconstitutional vagueness is simply untenable.

4. Our Memorandum Opinion and Order rejected Tri-State's asertion of financial hardship in large part because of its failure to submit a profit and loss statement prepared under generally accepted accounting principles. The Petition for Reconsideration includes, as an Appendix, a declaration from Tri-State's accounting firm stating that the financial statements submitted were prepared under generally accepted accounting principles and reflected procedures customary for a non-profit organization with limited funds, such as Tri-State. These statements indicate that Tri-State is in financially poor condition. A downward adjustment of the forfeiture is therefore warranted under the criteria established in the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), and adjusted in the recent *Policy Statement, Standards for Assessing Forfeitures*, FCC 93-382, released August 12, 1993.

5. Accordingly, the Petition for Reconsideration filed by Tri-State Inspirational Broadcasting Corporation, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects. IT IS ORDERED, that Tri-State Inspirational Broadcasting Corporation, Inc., licensee of Radio Station WBHL-FM, Florence, Alabama, FORFEIT to the United States one thousand two hundred fifty dollars ($1,250) for its repeated violations of Section 399B of the Communications Act of 1934, as amended, and Section 73.503(d) of the Commission's Rules. Payment of the forfeiture may be made by following the instructions on the enclosed form. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

[1] A Notice of Apparent Liability was released on August 11, 1992, 7 FCC Rcd 5123 (1992).

[2] The Notice of Apparent Liability described in detail both the rules governing donor and underwriting announcements and the manner in which Station WBHL's announcements violated these rules. It cited Section 399B of the Communications Act and Section 73.503(d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

DS3 ICB Order
Compliance Filings

Bell Atlantic Transmittal No. 344
Telephone Companies
Revisions to Tariff
F.C.C. No. 1.

Pacific Bell Transmittal Nos. 1438 and 1447
Revisions to Tariff
F.C.C. No. 128

Petition for Reconsideration

ORDER ON RECONSIDERATION

Adopted: August 24, 1993; Released: August 31, 1993

By the Acting Chief, Common Carrier Bureau:

1. On May 18, 1990, the Common Carrier Bureau (Bureau) released an order granting in part and denying in part a petition filed by the Williams Telecommunications Group, Inc. (Williams) to reject or suspend and investigate the above Bell Atlantic Telephone Companies (Bell Atlantic) Transmittal No. 344 and Pacific Bell Transmittal No. 1447.[1] In the *May 1990 Order*, the Bureau also dismissed as moot Williams' separate petition in opposition to the above Pacific Bell Transmittal No. 1438. On June 8, 1990, Williams filed a petition for reconsideration of the *May 1990 Order*. For the reasons discussed below, we dismiss that petition for reconsideration.

2. In seeking reconsideration of the *May 1990 Order*, Williams alleges that the Bureau arbitrarily and capriciously ignored parts of Williams' oppositions to these transmittals, that the Bureau failed to adequately consider the issues presented and neglected to make a "rational connection between the facts found and the choices made." Williams Petition at 3-5. Williams also contends that the Bureau's failure to address all parts of its petitions effectively nullifies Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, which authorizes the filing of petitions seeking suspension or rejection of new tariff filings. *Id.* at 5.

3. Under the Commission's Rules, petitions for reconsideration may be entertained only with respect to "final actions."[2] We note that our denial of Williams' petition to reject these tariff transmittals merely concludes that the challenged provisions are not patently unlawful so as to warrant rejection.[3] It does not preclude the Commission or the Bureau from initiating a subsequent investigation of Williams' claims nor does it prevent Williams from initiating a proceeding under Section 208 of the Act, 47 U.S.C. § 208, to determine whether these tariff revisions are in fact lawful. Similarly, the Bureau's denial of Williams' petitions to suspend and investigate these transmittals and the Bureau's dismissal of Williams' opposition to Pacific Bell Transmittal No. 1438 does not prevent the Bureau from starting an investigation at a later date nor does it prohibit Williams or any other aggrieved parties from filing a Section 208 complaint.

4. Under the circumstances, we conclude that the Bureau's refusal to reject or to suspend and investigate the above transmittals was not a "final action" for purposes of Section 1.106(a)(1) of the Commission's Rules, 47 C.F.R. § 1.106(a). This conclusion is consistent with the one reached by the U.S. Court of Appeals for the D.C. Circuit in Western Union International, Inc. v. FCC, 652 F.2d 136, 144 (1980).[4] Because only petitions for reconsideration of "final actions" may be entertained, we dismiss Williams' petition for reconsideration of the *May 1990 Order*.

5. Therefore, IT IS ORDERED that the petition for reconsideration filed by Williams Telecommunications Group, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

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[1] DS3 ICB Order Compliance Filings, CC Docket No. 88-136, 5 FCC Rcd 3331 (Com. Car. Bur. 1990) (*May 1990 Order*).

[2] See Section 1.106(a)(1) of the Commission's Rules, 47 C.F.R. § 1.106(a)(1). *Compare* Section 1.115(a), 47 C.F.R. § 1.115(a) ("[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission").

[3] The U.S. Court of Appeals for the D.C. Circuit has employed the patently unlawful standard to justify the summary rejection of carrier-initiated tariffs. *See* Municipal Light Boards v. FPC, 450 F.2d 1341, 1345-46 (D.C. Cir. 1971), *cert. denied*, 405 U.S 989 (1972).

[4] *Citing* Papago Tribal Utility Authority v. FERC, 628 F.2d 235, 239, (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980) (*Papago*). Similarly, in *Papago*, the D.C. Circuit Court of Appeals determined that an order of the Federal Energy Regulatory Commission (FERC), denying a motion for rejection of a utility rate filing was "undeniably interlocutory" and therefore not "final" for purposes of judicial review. *Papago*, 628 F.2d at 240.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-241

In re Applications of

DARRELL BRYAN (hereafter "Bryan") File No. BPH-920109MA

SBH PROPERTIES, INC. (hereafter "SBH") File No. BPH-920123MD

For Construction Permit
for a New FM Station on Channel 276A
in Tusculum, Tennessee

HEARING DESIGNATION ORDER

Adopted: August 3, 1993; Released: August 31, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Charter Filing.* In response to Item 3, Page 2, Section II of FCC Form 301 ("Legal Qualifications"), SBH indicates that its "Charter is in process of being filed." SBH shall submit an amendment detailing the date and place of filing of its Charter with the presiding Administrative Law Judge.

3. *Address.* Section II, Item 6 (new form) of FCC Form 301 (June 1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. SBH has not completed Item 6 correctly. SBH's application gives a post office box number as the residence address for Leonard P. Hite. Accordingly, SBH must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge after this Order is released.

4. *Late-Filed Amendments.* The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
SBH	10/22/92.

5. *Comparative Coverage.* Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. *Conclusion.* Except as may be indicated by any issues specified below, the applicants Bryan and SBH are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the Bryan and SBH applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That SBH shall submit the information specified in Paragraph 2 above, to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That SBH shall submit an amendment which contains the information required by Section II, Item 6 (new form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

10. IT IS FURTHER ORDERED, That the petition for leave to amend filed by SBH (10/22/92) IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated at Paragraph 4 above.

11. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the

[1] On January 23, 1992, Roger D. Bouldin and Raymond Deakins ("Bouldin") filed an application for the Tusculum allocation (BPH-920123ME). The application was returned on April 17, 1992 by the Chief, FM Branch as unacceptable for tender. On May 18, 1992, Bouldin filed a petition for reconsideration of that action. The Bureau has referred the Bouldin petition to the Commission, pursuant to 47 C.F.R. § 1.104(b), as part of an effort to expedite the final resolution of all cases involving applications subject to the Commission's previous "hard look" rules. *See Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936, published May 13, 1985, *recon. denied*, 50 Fed. Reg. 43157 (October 25, 1985), *aff'd sub nom. Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987). The *Report and Order* was reprinted at 58 RR 2d 776 (1985). The Commission recently modified the "hard look" processing rules, and made these revised rules effective as of August 7, 1992. *Report and Order, Commercial FM Broadcast Applications*, MM Docket No. 91-347, 7 FCC Rcd 5074 (1992). The applications for the Tusculum allotment were filed before that date and therefore are subject to the processing rules then in effect.

Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-242

In the Matter of

DAVID & SHERRY PIKE

Licensees of Station KRAN(AM)
Morton, Texas

Order to Show Cause Why the
License for Station KRAN(AM)
Morton, Texas Should
Not be Revoked

ORDER TO SHOW CAUSE
AND
HEARING DESIGNATION ORDER

Adopted: August 18, 1993; Released: August 31, 1993

By the Chief, Audio Services Division:

1. The Chief, Audio Services Division, Mass Media Bureau, has before him for consideration: (a) the license held by David and Sherry Pike, for Station KRAN(AM), Morton, Texas; and (b) the results of an investigation into KRAN(AM)'s silent status.[1]

2. The Commission's records indicate that KRAN(AM) has been off the air since March 13, 1991. The licensee's last request for authority to remain silent was granted through July 10, 1992 by letter dated April 10, 1992, from the Chief, AM Branch, Audio Services Division, Mass Media Bureau. In that letter, Mr. Pike was advised that any future requests for authority to remain silent must be accompanied by a detailed summary of steps being taken to return KRAN(AM) to on-air operations. That letter, however, was returned to the Commission as undeliverable. By letters dated May 7, 1992 and June 26, 1992, the Chief, AM Branch, requested that Mr. Pike file an updated address with the Commission in order to comply with 47 C.F.R. Section 1.5.[2] The June 26, 1992 letter was returned to the Commission as undeliverable. After numerous attempts, the staff finally located Mr. Pike by telephone on July 21, 1992. At that time, Mr. Pike asserted that he had responded to the letter of May 7, 1992 and that he had, in fact, provided the Commission with an updated address.[3] Mr. Pike was informed that he was in violation of the Commission's rules and was asked to resubmit his letter along with information regarding the station's current silence. A current address was also obtained from him at that time. In his written response, received July 28, 1992, Mr. Pike stated that he was attempting to sell the station and that he had located an interested party.[4] He also requested an extension of his authority to remain silent. This request has not been acted upon because Mr. Pike failed to respond to subsequent Commission requests, dated August 7, 1992 and October 23, 1992, by the Chief, AM Branch, for additional information needed to complete processing.[5] Accordingly, his request for further extension of silent authority will be dismissed herein for failure to prosecute. Consequently, KRAN(AM) is currently off the air without authority. Furthermore, because it appears that no substantial progress has been made by Mr. Pike to return KRAN(AM) to on-air status and Mr. Pike has not surrendered his license, Mr. Pike is in apparent violation of Sections 73.1740(a)(4)[6] (Minimum Operating Schedule) and 73.1750[7] (Discontinuance of Operation) of the Commission's Rules.

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[1] The Mass Media Bureau has been delegated authority to issue and release Show Cause Orders in cases involving silent broadcast stations. *See Debrine Communications, Inc.*, 7 FCC Rcd 2118 (1992).

[2] This section states:

> (a) Each licensee shall furnish the Commission with an address to be used by the Commission in serving documents or directing correspondence to that licensee. Unless any licensee advises the Commission to the contrary, the address contained in the licensee's most recent application will be used by the Commission for this purpose.

47 C.F.R. Sec. 1.5.

[3] Subsequent research of the relevant Commission records did not, however, confirm Mr. Pike's account.

[4] We note that no application for assignment of license has since been filed by Mr. Pike.

[5] Mr. Pike failed to certify that he is not subject to a denial of federal benefits pursuant to the Anti-Drug Abuse Act of 1988, 21 U.S.C. Sec. 862(a). This certification is required of every individual making an application to the Commission. *See In the Matter of Amendment of Part 1 of the Commission's Rules to Implement Section 5301 of the Anti Drug Abuse Act of 1988*, 6 FCC Rcd 7551 (1991).

[6] Section 73.1740(a)(4) provides:

> "In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary."

[7] Section 73.1750 provides:

> "The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the li-

3. Accordingly, IT IS ORDERED, That David Pike's request of July 28, 1992, requesting authority to remain silent, IS HEREBY DISMISSED for failure to prosecute.

4. IT IS FURTHER ORDERED, That pursuant to Section 312(a)(3) and (4) of the Communications Act of 1934, as amended, David and Sherry Pike are DIRECTED TO SHOW CAUSE why the license for Station KRAN(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether David and Sherry Pike have the capability and intent to expeditiously resume broadcast operations of KRAN(AM) consistent with the Commission's Rules.

(b) To determine whether David and Sherry Pike have violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether David and Sherry Pike are qualified to be and remain the licensee of Station KRAN(AM).

5. IT IS FURTHER ORDERED, That the Mass Media Bureau SHALL SERVE upon the licensees, within thirty (30) days of the release of this Order, a BILL OF PARTICULARS, with respect to the issues specified above.

6. IT IS FURTHER ORDERED, That, pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

7. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the licensees, pursuant to Section 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that they will appear at the hearing and present evidence on the matters specified in the Order. If the licensees fail to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensees file a written statement expressly waiving their right to a hearing, the licensees' right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered.[8]

8. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for KRAN(AM), Morton, Texas, it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensees in an amount not exceeding $250,000.00 for the willful and/or repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

censee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation."

[8] The Mass Media Bureau has been delegated authority to issue Revocation Orders in cases involving silent broadcast stations. *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-231

In the Matters of

Application of

Capitol Radiotelephone Inc.
d.b.a. Capitol Paging
1420 Kanawha Blvd. E.
Charleston, West Virginia 25301

For a Private Carrier Paging Facility
on the Frequency 152.480 MHz in
Huntington/Charleston, West Virginia

and

Imposition of Forfeiture Against

Capitol Radiotelephone Inc.
d.b.a. Capitol Paging
1420 Kanawha Blvd. E.
Charleston, West Virginia 25301

Former Licensee of Station WNSX-646
in the Private Land Mobile Radio
Services

and

Revocation of License of

Capitol Radio Telephone Inc.
d.b.a. Capitol Paging
1420 Kanawha Blvd. E.
Charleston, West Virginia 25301

Licensee of Station WNDA-400 in the
Private Land Mobile Radio Services

and

Revocation of License of

Capitol Radio Telephone Inc.
d.b.a. Capitol Paging
1420 Kanawha Blvd. E.
Charleston, West Virginia 25301

Licensee of Station WNWW-636 in the
Private Land Mobile Radio Services

and

Revocation of License of

Capitol Radiotelephone Company, Inc.
1420 Kanawha Boulevard East
Charleston, West Virginia 25301

Licensee of Station KWU-373 in the
Public Mobile Radio Service

and

Revocation of License of

Capitol Radiotelephone Company, Inc.
P.O. Box 8305
South Charleston, West Virginia 25303

Licensee of Station KUS-223 in the
Public Mobile Radio Service

and

Revocation of License of

Capitol Radiotelephone Co., Inc.
1420 Kanawha Boulevard East
Charleston, West Virginia 25301

Licensee of Station KQD-614 in the
Public Mobile Radio Service

and

Revocation of License of

Capitol Radiotelephone Company, Inc.
1420 Kanawha Boulevard
East Charleston, West Virginia 25301

Licensee of Station KWU-204 in the
Public Mobile Radio Service

HEARING DESIGNATION ORDER,
ORDER TO SHOW CAUSE AND NOTICE
OF OPPORTUNITY FOR HEARING

Adopted: August 3, 1993; Released: August 31, 1993

By the Commission:

INTRODUCTION

1. The Commission has under consideration the above-captioned private land mobile radio station application and licenses of Capitol Radiotelephone Inc. and Capitol Radio Telephone Inc. d.b.a. Capitol Paging (Capitol): application for a private carrier paging facility on the frequency 152.480 MHz in Huntington/Charleston, West Virginia, station WNSX-646, station WNDA-400 and station WNWW-636. The Commission also has under consideration the

above-captioned public mobile radio station licenses licensed to Capitol Radiotelephone Company, Inc. and Capitol Radiotelephone Co., Inc. (Capitol): station KWU-373, station KUS-223, station KQD-614 and station KWU-204.[1]

BACKGROUND

2. This matter involves the facts and circumstances surrounding the operation of private carrier paging (PCP) station WNSX-646 by Capitol. Capitol filed an application for this station, located at sites Huntington and Charleston, West Virginia in late March 1990.[2] Capitol sought to operate this station on the frequency 152.480 MHz, a shared private land mobile paging channel already authorized at these geographic locations to RAM Technologies (RAM) as licensee of station WNJN-621. Capitol and RAM were (and are) competitors in these particular markets in the provision of paging services. Capitol had been providing radio common carrier paging service and RAM had been providing private carrier paging service.

3. RAM filed a Petition to Deny and Motion for Stay objecting to grant of Capitol's application.[3] RAM contended that Capitol sought a PCP license for the sole purpose of causing harmful interference to RAM's PCP operations.[4] RAM's Petition to Deny and Motion for Stay was denied on the basis that RAM had at that time failed to prove that Capitol planned to intentionally interfere with RAM's station.[5] On August 31, 1990 RAM filed a Petition for Reconsideration of the action denying its Petition to Deny and Motion for Stay. Capitol was granted a license for station WNSX-646 on September 12, 1990 subject to the outcome of RAM's pending Petition for Reconsideration.

4. After Capitol initiated operation of station WNSX-646, RAM repeatedly complained of the very interference that it had previously anticipated.[6] Capitol was aware of these complaints.[7] On April 2, 1991, a meeting was convened by the Chief, Land Mobile and Microwave Division, Private Radio Bureau, in an effort to resolve these interference complaints.[8] The meeting concluded with an apparent settlement. RAM and Capitol agreed to cooperate to resolve harmful interference. RAM agreed to withdraw its Petition for Reconsideration. Subsequently, however, RAM continued to complain of harmful interference from Capitol and never withdrew its Petition for Reconsideration.

5. In this *Order* we grant RAM's Petition for Reconsideration. Capitol's application that resulted in grant of a license to operate station WNSX-646 is returned to pending status. Accordingly, Capitol is without authority to operate station WNSX-646. The August 9, 1990, denial of RAM's Petition to Deny is vacated. Although Petitions to Deny generally do not lie against Private Radio applications, we are treating RAM's Petition to Deny as an informal objection.

6. Information before the Commission suggests that private land mobile radio station WNSX-646 willfully and repeatedly violated the Communications Act of 1934, as amended (the Act), and the Commission's Rules (the Rules). Much of this information was developed by Commission field personnel dispatched to the location of station WNSX-646 in West Virginia from August 12, 1991 through August 15, 1991. Commission field personnel investigated repeated complaints of RAM, licensee of co-channel PCP station WNJN-621 in the same geographic area, that station WNSX-646 was causing willful and repeated harmful interference to station WNJN-621, as well as committing other violations of the Act and the Rules.

7. On July 30, 1992 the Chief, Land Mobile and Microwave Division, Private Radio Bureau, issued a Notice of Apparent Liability (NAL) for monetary forfeiture to Capitol in the amount of $20,000 for willful and repeated violation of Section 333 of the Act and Sections 90.403(e), 90.405(a)(3) and 90.425(b) of the Commission's Rules[9] based on the operation of PCP station WNSX-646 on August 12, 13, 14 and 15, 1991. Capitol replied to this NAL by filing a Rebuttal Statement.[10] Matters that were the subject of this NAL, as well as other related matters, are

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[1] For the purposes of this *Order*, the above-captioned corporate licenses are collectively referred to as "Capitol."

[2] FCC File No. 190207.

[3] This pleading, filed on March 30, 1990, was supplemented April 13, 1990 and July 26, 1990.

[4] RAM submitted several affidavits in support of this contention. Sgt. Wendell Adkins of the Barboursville, West Virginia Police Department stated that Capitol employees told him that RAM had to share frequencies with other companies and that the Police Department would have trouble with busy signals if it stayed with RAM. Other affidavits described conversations in which Capitol employees represented to the affiants that Capitol intended to "busy" the 152.480 MHz frequency to the detriment of RAM's customers.

[5] Letter of August 9, 1990, from Carol Fox Foelak, Chief, Compliance Branch, Land Mobile and Microwave Division, Private Radio Bureau, to Frederick M. Joyce, Esquire.

[6] See, *e.g.*, letter of November 27, 1990, from Frederick M. Joyce to Jerold Feldman (referencing, on behalf of RAM, oral complaint made to the FCC of harmful interference by Capitol); letter of November 28, 1990 from Frederick M. Joyce to Carol Fox Foelak (complaining, on behalf of RAM, of harmful interference caused by Capitol's retransmission of common carrier pages on 152.490 MHz from November 15, 1990 through November 18, 1990); letter of February 19, 1991 from Hon. Carl C. Perkins to Ralph A. Haller, Chief, Private Radio Bureau (complaining, on behalf of RAM, of Capitol interference to RAM that occurred in October 1990, and further complaining that "Capitol has apparently refused to contact RAM to cooperate in engineering its system to avoid harmful co-channel interference"); letter of March 5, 1991 from Frederick M. Joyce to Carol Fox Foelak (complaining, on behalf of RAM, of harmful interference caused by Capitol on March 4, 1991); and letter of March 19, 1991 from A. Dale Capehart to Mike Raymond (RAM complaint of interference on that date sent directly to Capitol).

[7] See, *e.g.*, letter dated December 4, 1990 from Kenneth E. Hardman on behalf of Capitol to Donna R. Searcy (response to RAM's November 28, 1990 interference complaint in which "Capitol Paging absolutely and categorically denies RAM's allegations") and letter dated March 15, 1991 from Kenneth E. Hardman on behalf of Capitol to Donna R. Searcy (response to RAM's March 5, 1991 interference complaint stating "the complaint is no more than another trumped up charge by RAM").

[8] Those attending included Richard J. Shiben, Chief, Land Mobile and Microwave Division (LMMD), Private Radio Bureau (PRB); Carol Fox Foelak, Chief, Compliance Branch, LMMD, PRB; Frederick M. Joyce, counsel for RAM; Kenneth E. Hardman, counsel for Capitol; certain principals of RAM; and a representative of the office of the Honorable Carl C. Perkins, member, U.S. House of Representatives.

[9] 47 C.F.R. §§ 90.403(e), 90.405(a)(3) and 90.425(b)(2).

[10] The decision regarding whether a forfeiture should be or-

now the subject of consideration in this proceeding. The following discussion details the gravamen of each of the issues designated for hearing.

DISCUSSION

8. *Interference.* Information before the Commission, including complaints from RAM that in some instances were accompanied by supporting affidavits, suggests that throughout the month of October 1990, from November 15, 1990 through November 18, 1990, on March 4, 1991, on March 19, 1991, and from July 17, 1991 through July 19, 1991, PCP radio station WNSX-646 willfully, maliciously and repeatedly transmitted on the frequency 152.48 MHz in the areas of Charleston, West Virginia and Huntington, West Virginia in a manner that caused harmful interference to the transmissions of PCP station WNJN-621,[11] in apparent violation of Section 90.403(e) of the Commission's Rules, 47 C.F.R. § 90.403(e),[12] and Section 333 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 333.[13]

9. Additional information before the Commission, including Commission monitoring and inspection, suggests that on August 12, 13, 14, and 15, 1991 PCP radio station WNSX-646 willfully, maliciously and repeatedly transmitted on the frequency 152.48 MHz in the areas of Charleston, West Virginia and Huntington, West Virginia in a manner that caused harmful interference to the transmissions of PCP station WNJN-621,[14] in apparent violation of Section 90.403(e) of the Commission's Rules, 47 C.F.R. § 90.403(e), and Section 333 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 333. Inspection and monitoring of station WNSX-646 by Commission field personnel during the period August 12-15, 1991 suggests that its transmissions were not for the purpose of conveying actual pages for subscribers. Indeed, although Commission monitoring indicated that station WNSX-646 frequently transmitted during this four-day period, not one of its transmissions appeared to be related to an actual page for a customer.

10. Capitol claims that its transmissions on August 12, 13, 14, and 15, 1991, were legitimate "test" transmissions.[15] Information before the Commission, however, including inspection and monitoring of station WNSX-646 by Commission field personnel during the period August 12-15, 1991 suggests that its transmissions were not primarily for the purpose of conducting tests. Because these transmissions were apparently neither for actual pages nor primarily for testing, it appears that instead the primary purpose of these transmissions was to cause harmful interference.

11. Capitol also contends that any harmful interference it may have caused was not "willful" because it had no deliberate intent to cause interference.[16] For purposes of revocation under Section 312(a) (or a forfeiture under Section 503(b)) of the Act, however, establishing that a violation of the Act or the rules is willful does not require us to establish that the licensee knew he was acting wrongfully; but only that the licensee knew that he was doing the acts in question.[17] Willful (and/or repeated) interference constitutes justification to impose sanctions, including revocation, without the need to establish a "deliberate attempt" to interfere.[18] Information before the Commission suggests that Capitol was aware of what it was doing when it transmitted on PCP station WNSX-646 and caused harmful interference. Such a factual finding alone would warrant a legal finding of willful violation of the Commission's Rules for the purposes of Sections 312(a) and 503(b) of the Act. Moreover, the extended duration of the transmissions, the content unrelated to completing actual pages or testing, and the repetitiveness of the interference also appear to indicate that Capitol did indeed have actual intent to deliberately interfere with RAM. Such a factual finding would support an additional finding of willful or malicious interference in violation of Section 333 of the Act.[19]

12. Finally, Capitol states that it took reasonable precautions to avoid causing harmful interference by having a "properly functioning inhibitor,"[20] and that with this inhibitor its test transmissions could not have caused harmful interference.[21] Commission on-site monitoring coupled with use of sophisticated direction-finding techniques, however, indicate that on August 12, 13, 14 and 15, 1991 Capitol's station repeatedly transmitted when RAM's station was transmitting pages, causing harmful interference to those pages.[22] Other information before the Commission indicates that harmful interference occurred on other occasions despite the existence of this "inhibitor" as well. Inspection of Capitol's facilities by Commission field personnel on August 15, 1991 indicated that this "inhibitor" consisted of a modified scanning receiver with a totally functioning front panel squelch control.[23] The existence of

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dered in an amount not to exceed a total of $20,000 for these apparent violations on August 12, 13, 14 and 15, 1991 is incorporated into this hearing proceeding.

[11] These transmissions may also have caused harmful interference to the transmissions of PCP station WNLM-930, licensed to Communication Service, Inc.

[12] Section 90.403(e) provides: "Licensees shall take reasonable precautions to avoid causing harmful interference. This includes monitoring the transmitting frequency for communications in progress and such other measures as may be necessary to minimize the potential for causing harmful interference."

[13] Section 333 of the Communications Act provides: "No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this Act or operated by the United States Government." The legislative history to this section makes clear that this section specifically prohibits harmful, intentional interference. *See* H.R. Rep. No. 316, 101st Cong., 1st Sess., at 8-9 (1989).

[14] These transmissions may also have caused harmful interference to the transmissions of PCP station WNLM-930.

[15] Capitol asserted this claim at the time of inspection of station WNSX-646 by Commission field personnel on August 15, 1991, in response to Commission correspondence, and in its Rebuttal Statement.

[16] Rebuttal Statement at 2.

[17] Southern California Broadcasting Company, 6 FCC Rcd 4387 (1991).

[18] Raymond C. Standring, 68 FCC 2d 1021, 1023 (1978).

[19] 47 U.S.C. § 312(a)(3) and (4); *see* note 13, *supra*.

[20] Capitol refers to this "inhibitor" as a device intended "to lock out' its transmitter when other co-channel licensees are transmitting pages." Rebuttal Statement of Capitol at 3-4.

[21] Rebuttal Statement of Capitol at 4.

[22] This interference included interruption of RAM's pages with the resultant inability on the part of RAM to complete its pages at that time or in a timely fashion thereafter.

[23] This is significant because the squelch setting affects wheth-

such a device does not mitigate the charge of harmful interference, especially where, as here, the harmful interference was not an isolated occurrence.

13. Capitol and RAM are competitors in the provision of paging services in Charleston and Huntington, West Virginia. Capitol has thousands of paging subscribers on its common carrier paging stations in these areas. RAM has thousands of paging subscribers on its private carrier paging (PCP) stations in the same areas. It appears, however, that at no time since it was initially licensed has Capitol had more than 22 subscribers to the PCP services it provides on station WNSX-646, licensed on the same frequency as RAM. Capitol's apparent willful, malicious and repeated interference to co-channel station WNJN-621, coupled with this information about the number of its subscribers, would appear to indicate that Capitol sought to degrade RAM's quality of service so that RAM's customers would take paging service from Capitol.

14. *Test transmission violations.* Information before the Commission, including complaints by RAM supported by affidavits, suggests that "test" transmissions conducted by station WNSX-646 in the Charleston and Huntington, West Virginia areas from November 15, 1990 through November 18, 1990,[24] on March 4, 1991[25] and from July 17, 1991 through July 19, 1991[26] were not kept to a minimum and did not employ sufficient measures to avoid harmful interference, in apparent violation of Section 90.405(a)(3) of the Commission's Rules, 47 C.F.R. § 90.405(a)(3).[27]

15. Information before the Commission, including Commission monitoring and inspection, also suggests that "test" transmissions conducted by station WNSX-646 on August 12, 13, 14, and 15, 1991, in the Charleston, West Virginia, and Huntington, West Virginia, areas were not kept to a minimum and did not employ sufficient measures to avoid harmful interference, in apparent violation of Section 90.405(a)(3) of the Commission's Rules, 47 C.F.R. § 90.405(a)(3). This information further suggests that an element of failure to keep "test" transmissions to a minimum included transmission of Morse code identification of station WNSX-646 on August 12, 13, 14, and 15 in the Charleston, West Virginia, and Huntington, West Virginia, areas at a rate of approximately seven (7) words per minute (wpm), in violation of Section 90.425(b)(2) of the Commission's Rules, 47 C.F.R. § 90.425(b)(2).[28]

16. Capitol admits that its station was transmitting at a Morse code setting that was too slow, but contends that this was an inadvertent mistake.[29] Capitol then alleges that because it was not aware that a Morse Code setting at this speed constituted a rule violation, its conduct was not willful and no forfeiture should be assessed.[30] To the contrary, Capitol's violation of this rule was willful under Sections 312(a) and 503(b) of the Act simply because Capitol caused its station to transmit communications at a Morse Code setting that was too slow.[31] Capitol's use of an unnecessarily slow Morse code identification during alleged testing inherently prolonged use of airtime to the detriment of co-channel licensees.

17. Capitol alleges that repeated testing was necessary to attempt to implement a "group call" service to a public safety organization -- the Greenup County Rescue Squad.[32] Information before the Commission, however, suggests that the Greenup County Rescue Squad itself never sought any relationship with Capitol for the provision of paging services in connection with its public safety function. Rather, it appears that a few individual members of the Squad sought paging service from Capitol for their own purposes.[33] Additional information before the Commission suggests that any testing that occurred related to these individuals took place before the transmissions the Commission monitored on August 12, 13, 14 and 15, 1991 and was not related to these transmissions.

18. *Improper Retransmissions.* Information before the Commission also suggests that from November 15, 1990 through November 18, 1990, and on or about August 27, 1992 and continuing to the present, Capitol willfully and repeatedly caused station WNSX-646 to transmit previously completed Radio Common Carrier (RCC) and PCP pages on the frequency 152.480 MHz, in apparent violation of Sections 90.173(b), 90.403(c) and 90.415(b) of the Commission's Rules, 47 C.F.R. §§ 90.173(b), 90.403(c) and 90.415(b).[34] It appears that some of this prior paging traffic

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er the receiver detects a signal. This particular piece of equipment could be, for all intents and purposes, completely functionally disabled by an improper squelch setting on the front panel. More reliable methods of providing for transmitter inhibitor circuitry such as use of a fixed tuned receiver or dedicated phone line are available.

[24] On these dates, it appears that Capitol operated on the frequency 152.480 MHz to cause retransmission of a steady stream of digital transmissions. *See* affidavits of Robert A. Moyer, Jr. and Raymon A. Bobbitt dated November 26, 1990, appended to letter of November 28, 1990 from Frederick M. Joyce, Counsel for RAM Technologies, Inc. to Carol Fox Foelak, Chief, Compliance Branch, Private Radio Bureau.

[25] On this date, it appears that Capitol operated on the frequency 152.480 MHz to cause repeated transmission of the station call sign without monitoring co-channel traffic. *See* Declaration of A. Dale Capehart dated March 5, 1991, appended to a March 5, 1991 letter from Frederick M. Joyce, Counsel for RAM Technologies, Inc. to Carol Fox Foelak, Chief, Compliance Branch, Private Radio Bureau.

[26] On these dates, it appears that Capitol operated on the frequency 152.480 MHz to cause station WNSX-646 to repeat four separate tones in sequence every 90 seconds without interruption, using a device patched into the paging base station that imitates the sound of a tone page transmission.

[27] Section 90.405(a)(3) provides, in pertinent part: "(a) Stations licensed under this part may transmit only the following types of communication: ... (3) Communications for testing purposes required for proper station and system maintenance. However, each licensee shall keep such tests to a minimum and shall employ every measure to avoid harmful interference."

[28] Section 90.425(b)(2) states: "The Morse code transmission rate shall be maintained between 20 and 25 words per minute."

[29] Rebuttal Statement of Capitol at 6-7.

[30] Rebuttal Statement of Capitol at 7.

[31] See discussion of "willful" at paragraph 10, *supra.*

[32] Rebuttal Statement of Capitol at 5-6.

[33] Generally, individual persons are not eligible to hold private land mobile licenses under Part 90 and therefore are not eligible for service from a PCP system such as Capitol's operating on the 152.480 MHz band.

[34] Section 90.173(b) provides in pertinent part: "All applicants and licensees shall cooperate in the selection and use of frequencies in order to reduce interference and make the most effective use of the authorized facilities." Section 90.403(c) provides: "Each licensee shall restrict all transmissions to the minimum practicable transmission time and shall employ an efficient operating procedure designed to maximize the utiliza-

was traffic not initially transmitted by Capitol.[35] It further appears that these transmissions were not made for a legitimate business purpose, but were unnecessary and non-essential communications calculated to reduce the amount of time available for RAM as a paging competitor to complete its legitimate pages on the same frequency.

19. *Misrepresentation.* In its June 17, 1992 reply to a letter pursuant to 47 U.S.C. § 308(b),[36] in its Rebuttal Statement to the subsequent NAL,[37] in providing information at the time of field inspection on August 15, 1991, in written and oral replies made to the Commission and its staff regarding complaints of harmful interference from RAM, and in other discussions with Commission personnel regarding the operation of station WNSX-646, it appears that Capitol made misrepresentations to the Commission, including (1) representations about the existence and number of paging subscribers of station WNSX-646 that were both internally inconsistent and inconsistent with information developed by Commission field personnel by monitoring and inspection of station WNSX-646 from August 12, 1991 through August 15, 1991; and (2) representations about attempting to provide public safety-related communications to Greenup County Rescue Squad. Capitol's apparent repeated misrepresentations suggest violation of Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17, and raise questions regarding whether Capitol has the requisite character qualifications to continue to remain a Commission licensee.[38]

20. *Lack of Candor.* It further appears that throughout this matter in dealing with the Commission and other licensees that Capitol has been less than forthcoming in representing the status of station WNSX-646 and Capitol's intentions with regard to the operation of that station, including being less than completely candid about (1) whether station WNSX-646 was engaged in legitimate testing during various instances of harmful interference to RAM; (2) whether station WNSX-646 was the source of particular instances of harmful interference to RAM; (3) the efficacy, use and operation of the "inhibitor" associated with station WNSX-646; (4) making subscriber billing data available to Commission personnel[39] and (5) whether Capitol became a licensee of station WNSX-646 primarily for the purpose of causing harmful interference to station WNJN-621.[40] Capitol's apparent repeated lack of candor in this matter raises questions regarding whether Capitol has the requisite character qualifications to continue to remain a Commission licensee.[41]

ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by RAM IS GRANTED, that the license of Capitol Radiotelephone Inc. d.b.a. Capitol Paging for station WNSX-646 on the frequency 152.480 MHz in the Huntington/Charleston, West Virginia area IS RESCINDED, and that the underlying application for that station (File No. 0190207) IS RETURNED TO PENDING STATUS.

22. IT IS FURTHER ORDERED, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e),[42] that the application of Capitol Radiotelephone Inc. d.b.a. Capitol Paging for a private carrier paging facility on the frequency 152.480 MHz in Huntington/Charleston, West Virginia (File No. 0190207) IS DESIGNATED FOR HEARING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the issues set forth in paragraph 28 of this *Order*.

23. IT IS FURTHER ORDERED that, regardless of whether the hearing record warrants an Order denying Capitol's application, IT SHALL BE DETERMINED, pursuant to Sections 503(b)(2)(C) and 503(b)(3)(A) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 503(b)(2)(C) and 503(b)(3)(A),[43] and Section 1.80(g) of the

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tion of the spectrum." Section 90.415(b) provides in pertinent part: "Stations licensed under this part shall not: ... (b) Render a communications common carrier service...."

[35] For example, RAM discovered some of *its* previous pages were being transmitted when its customers began to attempt to answer them. RAM informed its customers that no such pages were currently pending. Upon further investigation and monitoring, RAM concluded that its old pages were being transmitted by Capitol on the shared PCP channel.

[36] Letter of Richard J. Shiben, Chief, Land Mobile & Microwave Division, Private Radio Bureau, to Capitol Radiotelephone Inc., dated May 19, 1992.

[37] Letter from Richard J. Shiben, Chief, Land Mobile and Microwave Division, Private Radio Bureau, to Capitol Radiotelephone Inc. dated July 30, 1992 (7320-13/91186, 217XX0007).

[38] Section 1.17 of the Rules provides in pertinent part: "No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission." The Commission has revoked licenses for misrepresentations to the agency. See, *e.g.*, Pass Word, Inc. v. F.C.C., 673 F.2d 1363 (D.C. Cir. 1982).

[39] In response to the 308(b) letter's request for representative billing invoices, Capitol responded: "Our computer system does not generate hard copies of customer invoices for our files, and a hard copy cannot be provided." Letter from J. Michael Raymond, Vice President, Capitol Paging, to Federal Communications Commission, dated June 17, 1992. Upon inspection of station WNSX-646 on August 15, 1991, however, Capitol was able to provide field personnel with a computer printout of other business information.

[40] Additionally, obtaining a license for this purpose is an abuse of the Commission's processes. Misconduct which threatens the integrity of the Commission's licensing processes is considered as bearing on character. Character Qualifications, 102 FCC 2d 1179, 1211 (1986).

[41] Lack of candor not arising to the level of misrepresentation is nonetheless actionable. *See* Fox River Broadcasting, Inc., 88 FCC 2d 1132, 1137 (1982).

[42] Section 309(e) of the Act gives the Commission authority to formally designate an application for a license for hearing if a substantial and material question of fact is presented or the Commission for any reason is unable to find that it is in the public interest, convenience and necessity to grant the application.

[43] Section 503(b)(2)(C) of the Act gives the Commission authority to impose a forfeiture penalty not to exceed $10,000 for each violation or each day of a continuing violation (not to exceed a total of $75,000 for a single act) against a private radio licensee that willfully or repeatedly fails to comply with any provisions of the Act or rules. Section 503(b)(3)(A) of the Act gives the Commission authority to make this determination after notice and an opportunity for hearing before an Administrative Law Judge.

Commission's Rules, 47 C.F.R. § 1.80(g), whether an ORDER OF FORFEITURE shall be issued against Capitol in an amount not to exceed $20,000 for the apparent violations referred to in the July 30, 1992 Notice of Apparent Liability for Monetary Forfeiture and/or in an amount not to exceed $75,000 for each of the continuing rule violations set forth in subparagraph (g) of paragraph 28 of this *Order*.[44]

24. Additionally, pursuant to Sections 312(a)(2), 312(a)(3), 312(a)(4) and 312(c) of the Act, 47 U.S.C. §§ 312(a)(2), 312(a)(3) 312(a)(4) and 312(c),[45] Capitol IS ORDERED TO SHOW CAUSE why its captioned station licenses should not be revoked. The decision whether to revoke Capitol's captioned licenses will be based upon the issues set forth in paragraph 28 of this *Order*.

25. IT IS FURTHER ORDERED that because these matters involve substantially the same facts and issues they ARE CONSOLIDATED FOR HEARING pursuant to Section 1.227 of the Commission's Rules, 47 C.F.R. § 1.227.[46]

26. IT IS FURTHER ORDERED that to avail itself of the opportunity to be heard with respect to its application designated for hearing, Capitol, pursuant to Section 1.221(c) of the Commission's Rules, in person or by its attorney(s), within 20 days of the mailing of this Order, SHALL FILE in triplicate a WRITTEN APPEARANCE stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified with respect to its pending application in this *Order*.[47] [48] Capitol may, instead, within 20 days of the mailing of this Order, choose to dismiss its pending application without prejudice. Failure to file a written appearance or to dismiss this application without prejudice within 20 days of the mailing of this Order will result in dismissal of the application designated for hearing with prejudice for failure to prosecute.

27. IT IS FURTHER ORDERED that with respect to the revocation and forfeiture matters involved in this proceeding, Capitol may choose either to present evidence at a hearing or to waive its right to a hearing. If Capitol wishes to present evidence at a hearing before an Administrative Law Judge on the revocation and forfeiture matters, it SHALL FILE in triplicate a WRITTEN APPEARANCE stating this intention within 30 days from the release of this *Order*.[49] [50] If such a request is made, a time, place and Presiding Judge will be designated by later order.[51] If Capitol does not wish to present evidence at a hearing before an Administrative Law Judge on the revocation and forfeiture matters, it may file a statement within 30 days from the release of this *Order* waiving the right to a hearing.[52] If Capitol submits a timely statement waiving the right to a hearing on the revocation and forfeiture matters, it may also submit a further written statement (within 30 days from the release of this *Order*) either denying or seeking to mitigate or justify the matters alleged in this *Order*. If Capitol fails to respond to this *Order* within 30 days from its release requesting a hearing on the revocation and forfeiture matters set forth in this *Order*, Capitol will be deemed to have waived its right to a hearing on these matters. If Capitol waives its right to a hearing on the revocation and forfeiture matters, the Chief Administrative Law Judge will certify these aspects of the case to the Commission, and non-hearing administrative procedures will determine whether revocation should occur or whether a forfeiture should be issued.

28. IT IS FURTHER ORDERED THAT, based upon the information set forth in this *Order*, this case will be decided upon the following issues:

a. Whether, during the month of October 1990, from November 15, 1990 through November 18, 1990, on March 4, 1991, on March 19, 1991, and/or from July 17, 1991 through July 19, 1991, in light of the evidence adduced, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. willfully, maliciously and/or repeatedly caused private land mobile radio station WNSX-646 to transmit in a manner that caused harmful interference, in violation of Section 90.403(e) of the Commission's Rules, 47 C.F.R. § 90.403(e), and/or in violation of Section 333 of the Communications Act of 1934, as amended, 47 U.S.C. § 333.

b. Whether, on August 12, 13, 14, and 15, 1991, in light of the evidence adduced, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. willfully, maliciously and/or repeatedly caused private land mobile radio station WNSX-646 to transmit in a manner that caused harmful interference, in violation of Section 90.403(e) of the Commission's Rules,

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[44] All the other alleged violations are beyond the one-year statute-of-limitations period for forfeitures under Section 503(b) of the Act.

[45] Section 312(a)(2) of the Act gives the Commission authority to revoke a station license for matters coming to its attention which would have prevented granting the original application. Section 312(a)(3) of the Act gives the Commission authority to revoke a station license for willful or repeated failure to operate substantially as set forth in the license. Section 312(a)(4) of the Act gives the Commission authority to revoke a station license for willful or repeated violation of the Act or rules. Section 312(c) of the Act provides that these determinations shall be made pursuant to this Order to Show Cause.

[46] *See also* 47 U.S.C. § 154(j).

[47] If by filing such a written appearance Capitol intends to request a hearing on all three aspects of this case (the application, revocation and forfeiture matters), it must clearly indicate this (see paragraph 27).

[48] A copy of this written appearance should be sent to the Federal Communications Commission, Private Radio Bureau, Land Mobile and Microwave Division, STOP 1700A1, Washington, D.C. 20554.

[49] A copy of this written appearance should be sent to the Federal Communications Commission, Private Radio Bureau, Land Mobile and Microwave Division, STOP 1700A1, Washington, D.C. 20554.

[50] If by filing such a written appearance Capitol intends to request a hearing on all three aspects of this case (the application, revocation and forfeiture matters), it must clearly indicate this (see paragraph 26).

[51] If Capitol chooses to continue to prosecute the application at issue, then one consolidated hearing on the application, revocation and forfeiture matters will occur.

[52] In this instance, such a waiver would constitute waiver of Capitol's right to any hearing *de novo* before any administrative body or court regarding the forfeiture matters at issue.

47 C.F.R. § 90.403(e), and/or in violation of Section 333 of the Communications Act of 1934, as amended, 47 U.S.C. § 333.

c. Whether, from November 15, 1990 through November 18, 1990, on March 4, 1991, and/or from July 17, 1991 through July 19, 1991, in light of the evidence adduced, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. willfully and/or repeatedly caused private land mobile radio station WNSX-646 to transmit communications for testing purposes in a manner such that the tests were not kept to a minimum and every measure was not taken to avoid harmful interference, in violation of Section 90.405(a)(3) of the Commission's Rules, 47 C.F.R. § 90.405(a)(3).

d. Whether, on August 12, 13, 14, and/or 15, 1991, in light of the evidence adduced, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. willfully and/or repeatedly caused private land mobile radio station WNSX-646 to transmit communications for testing purposes in a manner such that the tests were not kept to a minimum and every measure was not taken to avoid harmful interference, in violation of Section 90.405(a)(3) of the Commission's Rules, 47 C.F.R. § 90.405(a)(3).

e. Whether, on August 12, 13, 14, and/or 15, 1991, in light of the evidence adduced, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. willfully and/or repeatedly caused private land mobile radio station WNSX-646 to identify its transmissions by Morse code at a rate less than 20-25 words per minute, in violation of Section 90.425(b)(2) of the Commission's Rules, 47 C.F.R. § 90.425(b)(2).

f. Whether from November 15, 1990 through November 18, 1990 Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. caused private land mobile radio station WNSX-646 to willfully and/or repeatedly transmit on the frequency 152.480 MHz for purposes other than completing private carrier pages, in violation of Sections 90.173(b) and 90.403(c) of the Commission's Rules, 47 C.F.R. §§ 90.173(b) and 90.403(c). Further, whether the content of these transmissions included common carrier paging traffic in violation of Section 90.415(b) of the Commission's Rules, 47 C.F.R. § 90.415(b).

g. Whether, beginning on or about August 27, 1992 and continuing to the present, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. caused private land mobile radio station WNSX-646 to willfully and/or repeatedly transmit on the frequency 152.480 MHz for purposes other than completing private carrier pages, in violation of Sections 90.173(b) and 90.403(c) of the Commission's Rules, 47 C.F.R. §§ 90.173(b) and 90.403(c). Further, whether the content of these transmissions included common carrier paging traffic in violation of Section 90.415(b) of the Commission's Rules, 47 C.F.R. § 90.415(b).

h. Whether in written and/or oral statements to the Commission or its staff with respect to the above matters, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc., Capitol Radiotelephone Company (Co.) Inc., and/or any of these entities doing business as Capitol Paging misrepresented facts to the Commission and/or was lacking in candor.

i. Whether, in light of the findings under paragraph (h), any of the above captioned applicants/licensees willfully or repeatedly violated Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17.

j. In light of the findings under paragraphs (a) through (i), whether Capitol Radiotelephone Inc., Capitol Radio Telephone Inc., Capitol Radiotelephone Company (Co.), Inc., and/or any of these entities doing business as Capitol Paging have the requisite basic character qualifications to continue to remain Commission licensees.

k. In light of the findings under paragraphs (a) through (j), whether Capitol Radiotelephone Inc., Capitol Radio Telephone Inc., Capitol Radiotelephone Company (Co.), Inc., and/or any of these entities doing business as Capitol Paging are qualified to retain each of their respective licenses set forth in the caption of this proceeding.

l. In light of the findings under paragraphs (a) through (k), whether any or all of the captioned radio station licenses should be revoked.

m. In light of the findings under paragraphs (a) through (l), whether Capitol Radiotelephone Inc. d.b.a. Capitol Paging filed an application for a private carrier paging facility on the frequency 152.480 MHz in Huntington/Charleston, West Virginia (File No. 0190207) primarily for the purpose of obtaining a license in order to cause harmful interference to station WNJN-621 licensed to RAM Technologies Inc.

n. In light of the findings under paragraphs (a) through (m), whether the application of Capitol Radiotelephone Inc. d.b.a. Capitol Paging for a private carrier paging facility on the frequency 152.480 MHz in Huntington/Charleston, West Virginia (File No. 0190207) should be granted.

29. IT IS FURTHER ORDERED that the Private Radio Bureau and RAM Technologies, Inc. (RAM) ARE MADE PARTIES to this proceeding.

30. IT IS FURTHER ORDERED that Capitol Radiotelephone Inc. d.b.a. Capitol Paging has the burden of proof and the burden of proceeding with respect to the matter of its application for a private carrier paging facility on the frequency 152.480 MHz in Huntington/Charleston, West Virginia (File No. 0190207). IT IS FURTHER ORDERED that with respect to all other matters in this proceeding the Private Radio Bureau has the burden of proof and the burden of proceeding.

31. IT IS FURTHER ORDERED that a copy of each document filed in this proceeding subsequent to the date of adoption of this *Order* shall be served on the counsel of record appearing on behalf of the Chief, Private Radio

Bureau. Parties may inquire as to the identity of the counsel of record by calling the Land Mobile and Microwave Division, Private Radio Bureau at (202) 632-7125. Such service shall be addressed to the named counsel of record, Land Mobile and Microwave Division, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554, STOP 1700A. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this *Order* shall also be served on the Chief, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554, STOP 1700.

32. IT IS FURTHER ORDERED that the Secretary of the Commission send a copy of this *Order* by *Certified Mail -- Return Receipt Requested* to Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., Capitol Radiotelephone Co., Inc., and RAM Technologies Inc. at their respective addresses of record as licensees.

33. IT IS FURTHER ORDERED that in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MOBILE TELECOMMUNICATION TECHNOLOGIES CORPORATION — File No. I-T-D-93-009

Application for authority to close maritime mobile public coast station KLU788 in Rochester, New York

ARCH CAPITOL DISTRICT, INC. — File No. I-T-D-93-010

Application for authority to close maritime mobile public coast station KFL993 in Schenectady, New York

ARCH CAPITOL DISTRICT, INC. — File No. I-T-D-93-011

Application for authority to close maritime mobile public coast station KLG325 in Fishkill, New York

OHIO BELL TELEPHONE COMPANY — File No. I-T-D-93-012

Application for authority to close maritime mobile public coast station KGW317 in Ironton, Ohio

OHIO BELL TELEPHONE COMPANY — File No. I-T-D-93-013

Application for authority to close maritime mobile public coast station KGW301 in Mingo Junction, Ohio

ORDER AND AUTHORIZATION

Adopted: August 19, 1993; Released: August 31, 1993

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on May 26, May 27, and May 6, 1993, respectively, by Mobile Telecommunication Technologies Corp. (MTel), Arch Capitol District, Inc. (Arch) and Ohio Bell Telephone Company (Ohio Bell), request authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from MTel's public coast station KLU788 in Rochester, New York; Arch's public coast stations KFL993 in Schenectady, New York and KLG325 in Fishkill, New York; and Ohio Bell's public coast stations KGW317 in Ironton, Ohio; and KGW301 in Mingo Junction, Ohio. Station KLU788 provides service to commerical and recreational vessels in the inland waterways and lakes in the vicinity of Rochester, New York. Station KFL993 serves commercial and non-commercial vessels operating out of ports between Utica and Albany, New York along the Hudson and Mohawk Rivers. Station KLG325 serves commercial and non-commercial vessels operating out of ports between New York City and Albany, New York along the Hudson River. Station KGW317 serves marine traffic in and around the city of Ironton, Ohio. Station KGW301 serves river traffic in and around the city of Steubenville, Ohio. The applications were placed on public notice on June 9, 1993. No comments were received.

2. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of their applications, all three applicants state that there has been a steady decline in revenue over the past several years. None of the stations receives more than a few calls per month. Subscribers are switching to more modern, less expensive, technologies, especially cellular radio services. All emergency calls are handled by the U.S. Coast Guard.

4. Upon consideration of the applications and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service at public coast stations KLU788, KFL993, KLG325, KGW317 and KGW301.

5. Accordingly, IT IS ORDERED that applications File Nos. I-T-D-93-009, I-T-D-93-010, I-T-D-93-011, I-T-D-93-012 and I-T-D-93-013 ARE GRANTED, and the applicants are authorized to discontinue service at public coast stations KLU788, KFL993, KLG325, KGW317 and KGW301.

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 790 at 795.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.114 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

AMSC SUBSIDIARY CORPORATION — File Nos. 420-DSE-P/L-90, 933-DSE-P/L-90, 2306-DSE-P/L-89, I-T-C-90-038

ROCKWELL INTERNATIONAL CORPORATION

GEOSTAR MESSAGING CORPORATION

COMMUNICATIONS SATELLITE CORPORATION-WORLD SYSTEMS DIVISION

In the Matter of

AERONAUTICAL RADIO, INC. AND THE AIR TRANSPORT ASSOCIATION OF AMERICA — File No. I-S-P-90-002

Provision of Aeronautical Services via the Inmarsat System

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-90-085

Applications for Authority to provide Limited Aeronautical Services within the U.S. via the Inmarsat System

Petition for Partial Reconsideration of Commission order granting authority for interim mobile satellite service

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 1993; Released: August 31, 1993

By the Commission:

I. INTRODUCTION

1. AMSC Subsidiary Corporation (AMSC) has filed a petition for partial reconsideration of the Commission's order granting it authority to provide interim domestic land mobile satellite service (LMSS) using the International Maritime Satellite Organization (Inmarsat) space segment in the lower L-band[1] until AMSC's dedicated upper L-band[2] domestic mobile satellite system is in operation.[3] It also has filed a petition for partial reconsideration of the Commission's order granting a temporary waiver permitting interim domestic aeronautical mobile satellite service (AMSS) via the Inmarsat system.[4] Specifically, AMSC requests in both petitions that the Commission establish technical guidelines for mobile terminals used to provide interim service that will allow such terminals to transition easily to the dedicated upper L-band U.S. system.[5] In addition, AMSC urges the Commission to require any interim service customers using Inmarsat for domestic service to transition to AMSC's system within 60 days of the time that AMSC begins operations. Rockwell International Corporation (Rockwell) filed comments and Aeronautical Radio, Inc. and the Air Transport Association of America (ARINC/ATA) filed joint comments and Communications Satellite Corporation (COMSAT) opposed AMSC's petitions.[6] For the reasons discussed below, we deny in part and grant in part AMSC's petitions for partial reconsideration.

II. BACKGROUND

2. In the *Interim Order*, the Commission granted interim authority to AMSC to operate thirty thousand mobile earth stations to provide domestic MSS using Inmarsat space capacity in the lower L-band until AMSC's domestic upper L-band system is operational. In addition, the order granted COMSAT authority to establish and operate communications channels via the Inmarsat system using the Marisat F-1 Atlantic Ocean Region (AOR) satellite and to provide communications channels to AMSC pursuant to lease arrangements. Finally, the order granted authority to Rockwell to operate fifteen thousand mobile earth stations to provide LMSS as a customer of AMSC.

3. In the *Aeronautical Waiver Order*, the Commission granted a temporary waiver of Commission rules which restrict Inmarsat aeronautical satellite service to international communications. It allowed domestic use of Inmarsat space segment for aeronautical satellite services to aircraft in domestic flight. This service was to be provided over the first generation Inmarsat satellites in the lower L-band and over the second generation Inmarsat satellites in the lower L-band plus 3 MHz of the upper L-band at 1545-1548 MHz and 1646.5-1649.5 MHz. The *Aeronautical Waiver Order* also granted Comsat interim authority to provide domestic aeronautical satellite capacity via

[1] The lower L-band is comprised of the 1525-1544/1626.5-1645.5 MHz frequency bands.

[2] The upper L-band is comprised of the 1545-1559/1646.5-1660.5 MHz frequency bands.

[3] American Mobile Satellite Corporation, et al, 7 FCC Rcd 942 (1992) (*Interim Order*).

[4] Aeronautical Radio, Inc., File No. I-S-P-90-002, 7 FCC Rcd 1006 (1992) (*Aeronautical Waiver Order*).

[5] Subsequent to the *Aeronautical Waiver Order*, the Commission adopted licensing procedures and equipment technical standards for aircraft earth stations (AES) in PR Docket No. 90-315. Any use of AES aboard U.S. aircraft will be required to meet the Part 87 technical standards and operational conditions established therein. Therefore, we limit our discussion in this order to mobile terminals used for LMSS. Amendment of Part 87 of the Commission's Rules to Establish Technical Standards and Licensing Procedures for Aircraft Earth Stations, PR Docket No. 90-315, 7 FCC Rcd 5895 (1992).

[6] Rockwell commented only on the LMSS petition. The other pleadings address both petitions.

Inmarsat space segment to implement these services. The temporary waiver will expire when the permanent U.S. MSS system is operational.

4. In authorizing interim service via the Inmarsat space segment, the Commission declined to establish technical criteria for LMSS terminals.[7] However, the Commission imposed a requirement on interim service providers that they file a transition plan demonstrating how they will move all domestic AMSS and LMSS traffic to the AMSC system without disruption to customers. This plan is to be filed within 90 days after launch of AMSC's first spacecraft. AMSC's petitions address both of these aspects of the *Interim Order*.

III. DISCUSSION

5. AMSC requests that the Commission give any interim service provider using INMARSAT a 60 day transition period in which to begin using AMSC's system. AMSC also requests that the Commission require the following technical characteristics for mobile terminals used to provide interim LMSS: (1) terminals be capable of operating throughout the lower and upper L-bands; (2) terminals be capable of operating at an effective isotropically radiated power (EIRP) of at least 10 db less than their nominal EIRP operating on the Inmarsat global beam; (3) terminals be capable of working through a spot beam satellite; and (4) terminals, feederlink stations and network control facilities must be designed to give priority and preemptive access for AMSS(R) and provide protection from interference. AMSC asserts that these requirements are necessary to ensure a smooth and economical transition from the Inmarsat space segment to AMSC's system once it is launched.

6. All parties filing in this proceeding oppose AMSC's request for a 60 day transition period. Comsat asserts that the requirement to file transition plans within 90 days of AMSC's launch, coupled with the Commission's regulatory authority, will be sufficient to allow for a smooth transition to AMSC's system. Rockwell estimates that up to six months may be necessary following the launch of AMSC's satellite to ensure a trouble-free transition that is minimally burdensome to end users. According to Rockwell, cutting this period to 60 days raises the potential of serious disruptions. In reply, AMSC asserts that its key concern is that the Commission provide a firm date for the completion of the transition rather than merely requiring service providers to submit a transition plan.

7. We agree with the commenters that AMSC's proposed 60 day transition deadline could result in disruptions. Such a deadline does not allow for solutions to unforeseen problems and could lead to inefficient implementation measures. We do believe, however, that it is advisable to establish a specific date for completion of the transition. Thus, service providers must file transition plans within 90 days of AMSC's launch[8] and will be afforded 90 days after this filing date to complete the transition.

8. Comsat and Rockwell also oppose AMSC's request that technical standards be applied to interim, LMSS service terminals. Comsat asserts that such standards are unnecessary and would require costly modifications, while Rockwell states that AMSC has not justified the burdens it would place on service providers and that marketplace forces will achieve the desired results. With respect to AMSC's specific proposals, Comsat states that service providers can, pursuant to the present authorization, use standard, "off the shelf" Inmarsat C terminals that operate in the lower L-band only. It asserts that requiring interim LMSS service providers to operate terminals capable of operating throughout the entire L-band, as AMSC urges, would require costly redesign and retrofitting now when AMSC's space segment will not be launched for several years. Comsat also argues that although AMSC's EIRP proposal is not burdensome, it is unclear how AMSC is defining "nominal EIRP" and thus the proposal would be difficult to implement.[9] With respect to AMSC's request that interim LMSS service terminals be required to operate with spot beams, Comsat states that INMARSAT already requires this capability by requiring terminals accessing its space segment to operate with INMARSAT spotbeams. Moreover, because spot beam operation varies depending on the technology and protocols for particular satellites, Comsat argues that such a requirement cannot be applied to AMSC's satellite, for which technical standards have not yet been set.[10] Finally, Comsat asserts that there is no reason to require priority and preemptive access design for safety services. Those services are allocated to the upper L-band and the LMSS authorization for interim service was given only for operation in the lower L-band.

9. ARINC/ATA agree with AMSC that interim LMSS terminals should be designed to protect safety services. They assert, however, that AMSC's proposals are inadequate and they renew their request for specific technical criteria.[11] In reply, AMSC states that the cost of making its proposed modifications is not significant and that without these standards, interim LMSS customers may have difficulty switching to AMSC's system.

10. We agree with Comsat that the technical standards proposed by AMSC are not necessary at this time and would impose modification burdens at some cost on interim LMSS service providers. However, as concluded in the *Interim Order*, because providers will be required to transition to the AMSC space segment once it is put into operation, it is in their best interest to develop equipment

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[7] ARINC/ATA had suggested that we delay authorization of service until issues regarding technical criteria designed to protect aeronautical safety services (AMSS(R)) are addressed. We stated that AMSS(R) did not have priority access in the lower L-Band and thus no issues of preemptive access exist. In addition, because Inmarsat will require type acceptance of any terminals that will operate with its system, there was no apparent reason to impose additional Commission-mandated technical criteria.

[8] We note that nothing prevents service providers from filing this transition plan sooner. Certainly, all interim service providers are on notice that this transition is mandatory. Thus, it is in their interest, as well as in the interest of AMSC, that this transition go smoothly.

[9] AMSC has also not identified the exact reduction requested for the transmitter power of the interim LMSS mobile terminals or the mechanism by which the power will be reduced, i.e., by a licensed technician or by an automatic switch.

[10] For example, AMSC has not identified the number of signalling frequencies the interim LMSS terminals need or how the signalling frequencies will be used to access the AMSC satellite.

[11] *See* ARINC/ATA Comments at 8.

that can be readily converted. It is, however, appropriately left to the service provider to determine how to accomplish this goal.[12] AMSC has not presented convincing evidence that our original conclusion was incorrect. We find that imposing AMSC's requested technical standards is not necessary and that the interim LMSS provider is in the best position to weigh the costs and benefits involved in determining the optimal timing for its mandatory move to AMSC-compatible units.

11. We also reject ARINC/ATA's renewed request for priority and preemptive access over LMSS terminals operating in the lower L-band for the same reasons given in the *Interim Order*.[13] Until recently the lower L-band authorized for interim LMSS has been allocated for maritime MSS, not aeronautical MSS. On May 13, 1993, we allocated the lower L-band to generic MSS, which includes AMSS(R) services. However, pre-emptive real time access to AMSS(R) services is not provided in the lower L-band but rather in the upper L-band only.[14] Thus, AMSS(R) is not entitled to priority and preemptive access in the lower L-band as it is in the upper L-band. Consequently, no issues regarding protection of these services are raised by our interim authorization.

IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED that AMSC's Petitions for Partial Reconsideration ARE DENIED IN PART and GRANTED IN PART, as discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[12] *See Interim Order* at para. 12. As noted, interim service providers will be afforded up to six months to transition to AMSC's upper L-band system once it becomes operational. This transition deadline will be strictly enforced and will not be extended absent an unforeseen or compelling circumstance. Interim service providers are advised that the expense of transitioning to AMSC-compatible equipment will not be considered an unforeseen or compelling circumstance and will not justify an extension of the transition deadline. Thus, interim providers may want to consider offering interim LMSS service with AMSC-compatible equipment, to the extent it is available, as a means of reducing later transition costs. We will, however, leave this decision to the interim service provider.

[13] As stated in the *Aeronautical Waiver Order*, with respect to feederlink stations and network control stations, aircraft and Inmarsat network control office centers will be able to control communications to and from aircraft to support safety services in the AMSS(R) bands used by the Inmarsat second generation space segment, 7 FCC Rcd at 1012, note 48.

[14] *See Report and Order* and *Further Notice of Proposed Rulemaking*, GEN Docket 90-56, adopted May 13, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 31, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NEWSPAPER ASSOCIATION OF AMERICA'S APPLICATION FOR REVIEW OF BELLSOUTH'S STRUCTURAL RELIEF

CC Docket Nos. 88-2, Phase I, and 90-623

On August 13, 1993, the Newspaper Association of America (NAA) filed an application for review of the Common Carrier Bureau's Memorandum Opinion and Order (MO&O) removing the structural separation requirements for BellSouth Corporation (BellSouth). NAA argues that the Commission should review and reverse the Bureau's MO&O granting BellSouth structural relief, or it should remand the MO&O for further consideration by the Bureau.

Pursuant to the *BOC Safeguards Order*, 6 FCC Rcd 7571, each Bell Operating Company (BOC) is permitted to petition the Commission for relief from the structural separation requirements if it is technically prepared to offer its ONA services, has effective federal tariffs for each of its initial interstate ONA services, and has filed state tariffs for each of its initial intrastate ONA services.

NAA argues that the Commission's non-structural safeguards fail to provide sufficient protection against anticompetitive conduct by the BOCs. NAA also argues that the Common Carrier Bureau was too hasty in acting on BellSouth's petition. NAA states that, since petitions for review are pending before the Courts on the Commission's decision to replace structural separation with non-structural safeguards, the Commission should wait until the Courts decide this issue.

Interested parties should file comments on NAA's application for review by **September 22, 1993,** and reply comments by **October 6, 1993,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the application can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-304

In the Matter of:

Renewal Reporting Requirements for
Full Power, Commercial AM, FM and TV
Broadcast Stations

REPORT AND ORDER

Adopted: August 20, 1993; Released: September 1, 1993

By the Commission:

I. INTRODUCTION

1. On December 30, 1992, the Commission released a *Notice of Proposed Rule Making (Notice)*[1] in the above-captioned proceeding. The Commission initiated this proceeding to consider whether to require licensees of certain types of broadcast stations to report on their license renewal applications the current status of their operations. In particular, the Commission proposed to modify FCC Form 303-S to require licensees of full power commercial AM, FM and TV stations to report, at the time their license renewal applications are submitted, whether their stations are on the air or have discontinued operations. As discussed below, we are adopting the proposed changes to FCC Form 303-S.

II. DISCUSSION

2. *Comments.* In response to the *Notice*, the National Association of Broadcasters (NAB) and National Public Radio (NPR) filed comments. No reply comments were filed. NAB supports the Commission's proposal to modify Form 303-S as stated above. NAB believes, however, that the Commission should not use the information regarding discontinued station operations to foster re-licensing of these stations, but to reduce "the surplus of radio stations throughout this country." Specifically, NAB asserts that when a station has discontinued operations, that station's license should be cancelled or denied and its underlying allotment deleted.[2] NAB states that such action would be consistent with the Commission's decision on AM improvement[3] and would further important policy goals.

3. NPR filed comments asking that, should the Commission adopt the change proposed in the *Notice*, the Commission make clear its stated intention that noncommercial stations be exempted from the new requirement. NPR specifically requests that the Commission include in the instructions for the new question a statement that the question does not apply to noncommercial broadcast stations. Without such instructions, according to NPR, it is possible that noncommercial stations will interpret the added question as applicable to them. Many such stations that are off the air in compliance with the Commission's Rules will answer the new question in the affirmative and unnecessarily prepare an attachment explaining the station's operating schedule.

4. *Decision.* When the Commission adopted the *Notice*, we were aware of more than 200 commercial AM and FM stations that had discontinued operations. In the time since adoption of the *Notice*, we have seen the number of reported silent AM and FM stations grow to more than 300. Of these stations, a number have gone silent without timely notification to the Commission as required by our Rules.[4] As we indicated in the *Notice*, when the Commission is unaware that a station has gone off the air, the lack of information about a station's operations impairs the Commission's ability to properly discharge its responsibility to determine whether grant of the renewal would be in the public interest. For example, if we are unaware that a station has gone off the air, we cannot assess whether the licensee has complied with our rules for doing so, whether the cessation of service is justified, and whether the licensee has developed an acceptable plan for resuming broadcast service. Such considerations persuade us that adoption of the proposed changes to Form 303-S is warranted. The information gathered will be of substantial benefit to the Commission while imposing, at most, a minor burden on licensees.

5. NAB has raised the issue of what should be done with respect to an FM allotment listed in our Rules once the license of a silent FM station has been cancelled. NAB urges that the allotments of silent stations should simply be deleted. This determination, however, is outside the scope of this proceeding, and we will not therefore address the issue herein. In any event, as indicated above, NAB has previously raised this issue in a separate petition for rule making, and that petition has been placed on Public Notice.

6. In its comments, NPR has raised legitimate concerns relating to the instructions to Form 303-S. Currently, Form 303-S contains general instructions and question-by-question guidelines. The general instructions provide basic information that is of use to the applicant, such as where and

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[1] 8 FCC Rcd 49 (1992)

[2] NAB filed a petition for rule making on February 10, 1992, urging the Commission to initiate a comprehensive review of the Commission's FM allotment policies. In that petition, NAB raises, *inter alia*, the issue of deleting the allocation of silent FM stations.

[3] *Report and Order* in MM Docket No. 87-267, 6 FCC Rcd 6273 (1991).

[4] Section 73.1740(a)(4) of the Commission's Rules permits commercial AM, FM and TV licensees to limit or discontinue operations for a period of 30 days without authority from the Commission. Licensees are required, however, to notify the Commission of limited or discontinued operations not later than the 10th day of such operation. The licensee is required to request additional time if station operations are not resumed within 30 days. In addition, Section 73.1750 requires these commercial licensees to tender their license authorizations to the Commission for cancellation when discontinuance of station operations is permanent.

when the form should be filed and by whom, and who is required to pay a fee. The question-by-question guidelines, on the other hand, provide more detailed information that is intended to aid the applicant in properly completing each of the specific questions on the form. Where a particular question does not apply to certain applicants, the guideline for that question so explains. The *Notice* explicitly stated that noncommercial broadcast licensees would be excluded from the reporting requirement at issue here,[5] and nothing in the record of this proceeding counsels a different approach. Thus, we continue to believe that the reporting requirement adopted here should apply only to commercial broadcast stations. Consistent with that belief, and consistent with the format of the Form 303-S instructions, we are amending these instructions to clearly state that the new question is limited to licensees of commercial AM, FM and TV broadcast stations. The new question and the associated instructions, as they will appear in FCC Form 303-S, are set forth in Appendix A.[6]

III. CONCLUSION

7. For the reasons discussed above, we are adopting modifications to FCC Form 303-S to require licensees of commercial AM, FM and TV broadcast stations to disclose, at the time their renewal applications are filed, whether or not their stations are on the air. This new requirement, while only minimally burdensome to licensees, will enhance the ability of the Commission to continue to license broadcast stations in the public interest.

Final Regulatory Flexibility Analysis

8. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

9. **Need and purpose of this action:** This *Report and Order* modifies FCC Form 303-S to solicit information as to the status of licensees' broadcast operations.

10. **Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:** There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

11. **Significant alternatives considered and rejected:** None.

Ordering Clauses

12. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303, FCC Form 303-S IS AMENDED as set forth in Appendix A, below.

13. IT IS FURTHER ORDERED that this *Report and Order* will be effective 30 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

1. The instructions for FCC Form 303-S are amended by adding an explanation to question 10, to read as follows:

Instructions for FCC 303-3

Application for Renewal of License for Commercial and Noncommercial AM, FM or TV Broadcast Station

* * * * *

Question-by-question Guidelines

* * * * *

Question 10. This question should be completed only by a commercial radio or television renewal applicant.

2. FCC Form 303-S is amended by adding question 10 to read as follows:

* * * * *

Application for Renewal of License for Commercial and Noncommercial AM, FM or TV Broadcast Station

* * * * *

10. For commercial AM, FM and TV applicants only: Is the station currently on the air? [ ] Yes [ ] No

If No, attach as Exhibit No. _____ a statement of explanation, including the steps the applicant intends to take to restore service to the public.

[5] *Notice*, 8 FCC Rcd at 49 n.1.

[6] We have altered the language of the new question from that specified in the *Notice* to make it clear that licensees must, under Section 1.65 of the Commission's Rules, report any changes in the station's status during the pendency of their applications. Moreover, we stress that nothing in this *Report and Order* is intended to alter the ongoing, independent obligations of commercial and noncommercial licensees to comply with the rules for notifying the Commission or seeking FCC authorization in connection with discontinued operations.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: September 1, 1993

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

KLDT-TV 55, Inc.	1800C1-MD
Licensee, Television Station KLDT	92060329
P.O. Box 55	92090443
Hurst, TX 76053	

Attn: Mrs. Opal Thornton, President

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended. It appears that KLDT-TV 55, Inc., licensee of Television Station KLDT, Lake Dallas, Texas, violated Commission rules governing public inspection files, main studio staffing, and contracts affecting ownership or control of a licensee.

Background

On June 11, 1992, we received a complaint from Howard Swindle and Allen Pusey of the Dallas Morning News, indicating that they were unable to review the public inspection file of Television Station KLDT by visiting the station's main studio during normal business hours (at 11:30 a.m. and at 1 p.m.) on Thursday, June 4, 1992. The complaint stated that the main studio, at 2450 Rockbrook Drive, Lewisville, Texas, appeared to be empty (except for a desk visible through the window). Further, the complainants alleged that they were unable to reach anyone at the station by calling the station's phone number (214-316-7000). Instead, they reached a recorded message which, without affording the caller an opportunity to leave a message, advised that Channel 55 had leased its broadcast day to Rev. Robert Tilton.

As a result of this complaint and earlier observations of our field office (in March 1992) concerning KLDT's limited broadcast and main studio hours, we initiated an investigation into the operations of KLDT. We were particularly concerned with questions of control of the station, inasmuch as it appeared that the designated main studio had been abandoned while all of the programming was being originated by entities associated with Robert Tilton.

On Tuesday morning, July 21, 1992, at 10 a.m., FCC investigators visited the main studio of Television Station KLDT at 2450 Rockbrook Drive, Lewisville. They found no one on the premises (no one answered knocks on the doors, no cars were in the parking lot, and no one associated with the station approached the studio during the 20 minutes Commission personnel were there). The regular staffing hours were not posted. The investigators proceeded to the television studios of Word of Faith Outreach Center, there interviewing Robert Tilton concerning his arrangements with KLDT. At approximately 12 noon, when the FCC investigators were ready to leave the Word of Faith studios, they learned from Tilton that the KLDT studio was currently staffed and that KLDT's owner would shortly be available to meet with them at the main studio.

Returning to 2450 Rockbrook Drive, the investigators met first with John Norton, KLDT's Operations Manager. Opal Thornton, President and 100% shareholder of the licensee corporation, arrived at about 12:45 p.m. Upon request, the licensee provided the public inspection file and other documents concerning the station's operations. On that occasion, and during the several days following, Ms. Thornton, John Norton, and other persons associated with the station or with the Thornton family answered questions concerning licensee control of the station and standard operating practices.

On August 21, 1992, the Commission's Mass Media Bureau sent the licensee a follow-up letter of inquiry. KLDT-TV 55, Inc., responded by letter dated September 11, 1992.

Main Studio and Public Inspection File

Because public access, both to the main studio and to the public inspection file, is the key element in our analysis of this case, we will treat both issues together here.

The main studio rule, 47 C.F.R. § 73.1125, requires each licensee to maintain a "meaningful management and staff presence" at its main studio location. *Main Studio and Program Origination Rules (Clarification)*, 3 FCC Rcd 5024 (1988). In *Jones Eastern of Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991), *clarified*, 7 FCC Rcd 6800 (1992), the Commission defined a minimally acceptable "meaningful presence" as full-time managerial and full-time staff personnel. It further stated that there must be "management and staff presence on a full-time basis during normal business hours to be considered 'meaningful.'" 6 FCC Rcd at 3616 n.2; *see also* 7 FCC Rcd at 6800 n.4. Although stations with only one studio and four or fewer employees need not limit their employees' ability to leave the studio to conduct station business, the main studio must remain attended during normal business hours. Management personnel need not be "chained to their desks" during normal business hours, but must "report to work at the main studio on a daily basis, spend a substantial amount of time there and . . . use the studio as a 'home base.'" *Jones Eastern Clarification*, 7 FCC Rcd at 6802.

Section 73.3526 of the Commission's rules requires that each commercial broadcast station maintain a public inspection file at its main studio or at another accessible place in its community of license. That file is to be available for public inspection at any time during regular business hours. 47 C.F.R. § 73.3526(d). Moreover, inspection of the public file should not be premised upon an advance appointment. *Availability of Locally Maintained Records*, 28 FCC 2d 71 (1971).

So that any concerned individual or group may effectively participate in Commission procedures concerning a broadcast licensee, including the evaluation of a licensee's performance, the rule spells out in detail what information and documentation is to be kept in a station's public inspection file. Among other things, the file must include the station's annual ownership reports (47 C.F.R. § 73.3526(a)(3)), letters received from the public regarding operation of the station (47 C.F.R. § 73.3526(a)(7)), a list of programs that have provided the station's most significant treatment of community issues (47 C.F.R. §

73.3526(a)(8)(i)), and records demonstrating how the licensce responded to the educational and informational needs of children in its overall programming (47 C.F.R. § 73.3526(a)(8)(iii)).

The evidence available indicates that KLDT failed in its obligation to make its main studio and its public inspection file accessible to the public during regular or normal business hours. The evidence also indicates that KLDT failed to keep its public inspection file complete and up to date as required by the rules.

The licensee provided no specific information in writing concerning staffing at the main studio. Information provided during interviews was ambiguous or contradictory. During interviews, Opal Thornton told our investigators that she spends time at the studio but has no set schedule. She indicated that during the five weeks prior to the investigation (from June 8 to July 13, 1992), she had not been present at the studio very much because her presence had been required at court for a civil trial proceeding concerning a KLDT contract. She also told our investigators that John Norton, Operations Manager, "is here all the time, on weekends, too." John Norton told our investigators that he staffs the studio on a regular basis four to five hours a day, five days a week, from 8 a.m. to noon or from 9 a.m. to 1 p.m. Nevertheless, the licensee did not explain why the main studio appeared not to be staffed during those hours on June 4, before noon on July 21, or on March 19 at approximately 3 p.m.

Attempting to explain why the Dallas Morning News reporters were unsuccessful in their attempts to see the public inspection file on June 4, Ms. Thornton speculated that someone may have been at the studio then but because of other tasks could not answer the door. Ms. Thornton stated that John Norton "does not maintain a log of his hours and has no current recollection of the specific times and dates" referred to in our inquiry, including June 4.

It appears that the KLDT television studio, during a period of time when it was broadcasting 24 hours a day, was not staffed on June 4 at 11:30 a.m. or at 1 p.m., or before 12 p.m. on July 21. During March 1992, when it was broadcasting substantially less than 24 hours a day (KLDT's "normal hours of operation were 5 hours per day" from February 1 to May 18, 1992, according to the written response), it appears that the main studio was not regularly staffed at 3 p.m. Furthermore, it does not appear that the main studio had business hours that were regular (in the sense of consistent) or normal (in the sense of conforming to an established norm). As a result, the main studio was not attended by management and staff personnel during normal business hours. This failure to provide a full-time presence that can be considered meaningful is a violation of Section 73.1125 of our rules. Also as a result, the public file was not available to the degree required, in violation of Section 73.3526(d) of our rules.

On July 21, 1992, Opal Thornton showed the investigators the public inspection file, which is maintained at 2450 Rockbrook Drive, Lewisville. It was missing an ownership report for 1991, letters from members of the public, and lists of programs demonstrating how the station dealt with community issues and children's educational and informational needs. There was nothing to suggest that these documents had ever been placed in the public inspection file. These omissions violate Section 73.3526(a) of our rules.

Filing of Contracts Affecting Ownership

Under Section 73.3613 of our rules, a licensee must file with the Commission, within 30 days of their execution, "contracts, instruments or documents relating to the present or future ownership or control of the licensee," including options. 47 C.F.R. § 73.3613(b).

With its written response dated September 11, 1992, the licensee submitted a copy of an agreement dated April 16, 1992, between KLDT-TV 55, Inc., and Word of Faith Outreach Center Church, granting Word of Faith an option to purchase "all the assets of KLDT-TV 55, Inc." Although acknowledging that the parties would be "unable to consummate the transfer of the license to broadcast without the prior consent of the Federal Communications Commission," this agreement appears to be one which should have been filed with the Commission. Our records indicate, however, that this option agreement with Word of Faith Outreach Center Church (which apparently remained in effect from April 16 to September 10, 1992) was never filed with the Commission, in violation of Section 73.3613(b) of our rules.

Conclusion

Thus, it appears that at least from June 4, 1992, to July 21, 1992, KLDT-TV 55, Inc., violated Section 73.1125 of the by failing to maintain a meaningful management and staff presence at the main studio. It also appears that the licensee on those dates violated Section 73.3526 of the Commission's rules by failing to maintain a complete public inspection file that was accessible to members of the public during regular business hours. Further, by failing to file the April 16, 1992, option to purchase the assets of KLDT-TV 55, Inc., within 30 days of its execution, the licensee apparently violated Section 73.3613 of the Commission's rules continuously from May 16, 1992, to at least September 11, 1992.

Accordingly, pursuant to Section 503(b) of the Communications Act, KLDT-TV 55, Inc., is hereby advised of its apparent liability for a forfeiture of twenty thousand dollars ($20,000) for the foregoing willful and repeated violations. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement on Standards for Assessing Forfeitures*, FCC 93-382 (adopted Aug. 3, 1993; released Aug. 12, 1993). Under these standards, $5,000 is the base forfeiture for violation of our public inspection file rule; $10,000 is the base forfeiture for violation of our main studio rule; and $5,000 is the base forfeiture for a failure to file required information. We find no apparent reason to adjust these base amounts, either up or down.

In regard to this forfeiture proceeding, the licensee is afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on August 23, 1993.

BY DIRECTION OF THE COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Independence Public Media of Philadelphia, Inc. against Suburban Cable TV Co., Inc.	CSR-3806-M PA1650

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: August 23, 1993; Released: September 1, 1993

By the Chief, Mass Media Bureau:

1. On February 23, 1993,[1] a petition on behalf of Independence Public Media of Philadelphia, Inc., licensee of Television Broadcast Station WYBE (Educ., Ch. 35), Philadelphia, Pennsylvania, was filed with the Commission claiming that Suburban Cable TV Co., Inc. ("Suburban")[2] had declined to carry the station, even though Philadelphia is within fifty miles of the system's principal headend at Pottstown, Pennsylvania, and it is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) [1992 Cable Act].

2. On April 13, 1993, Suburban filed an opposition to this complaint, in which it acknowledges that WYBE meets the 1992 Cable Act's tests as a qualified NCE station because it is located within 50 miles of the system's principal headend. However, Suburban contends that WYBE fails to deliver either a predicted Grade B or a good quality signal to its headend. It argues, therefore, that it is not required to carry WYBE's signal, pursuant to Section 615(g)(4) of the 1992 Cable Act. In support of its contention, Suburban submits an engineering survey prepared by the consulting firm of Cohen, Dippell, and Everist, P.C. that indicates that WYBE delivers an off-air signal to Suburban's headend processing equipment that is -52.05 dBm. In addition, Suburban includes pictures of videotaped programming taken from WYBE's signal on April 8, 1993, between 6:00 and 6:30 p.m. which, according to Suburban, indicate that the pictures received frequently include snow and both leading and lagging ghosts. Suburban asserts that because the signal strength of WYBE is well below the -45 dBm standard established by the Commission for commercial UHF stations, and because the quality of the station's signal is poor as revealed by the videotape, WYBE's petition must be denied.

3. Section 615(g)(4) of the Communications Act of 1934, as amended, states that "a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission." 47 U.S.C. 535(G)(4). Because the cable operator is in the best position to know whether a given NCE station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it has used good engineering practices, as defined below, to measure the signal delivered to the headend.

4. With respect to the standard to be used to determine what constitutes a "good quality" signal, we note that the 1992 Cable Act failed to set a standard for either VHF or UHF noncommercial stations. However, the 1992 Cable Act did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine, absent other evidence, whether VHF or UHF non-commercial stations place adequate signal levels over a cable system's principal headend.

5. In this instance, Suburban determined WYBE's signal strength to be below the requisite level for a UHF commercial station. We find, however, that the cable system failed to follow generally acceptable engineering practices in making its determination. Generally, if the test results are less than -51 dBm for a UHF station, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.[3]

6. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done. When measured against these criteria, we

[1] Although WYBE's petition was originally filed on February 23, 1993, it was not perfected and accepted for filing until April 16, 1993.

[2] WYBE identifies Suburban in its petition as generally serving Philadelphia, Pennsylvania; however, the Commission's records and Suburban's own statement indicate that Suburban serves Pottstown, Pennsylvania.

[3] For VHF-TV stations, if the test results are less than -55 dBm for a VHF station, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24 hour period, with measurements no more than 4 hours apart to establish reliable test results.

conclude that the test submitted by Suburban is insufficient to demonstrate that WYBE's signal is not of "good quality" at the cable system's headend.

7. Further, we will generally not consider photographs, photographs of a video tape, or the video tape itself to establish the presence or absence of a good quality signal for must-carry purposes. We believe the videotaping, video playback equipment, television receiver as well as photographic equipment used may interject impairments (*e.g.*, noise, equipment characteristics, color integration, etc.) which could make it difficult to judge whether the videotape or photograph accurately represents the station signal. Consequently, we will only consider such evidence as a supporting factor to properly performed engineering measurements.

8. Accordingly, the petition filed February 23, 1993, by Independence Public Media of Philadelphia, Inc. IS GRANTED, pursuant to Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Suburban Cable TV Co., Inc. IS ORDERED to commence carriage of Station WYBE forty-six (46) days from the release date of this *Order* unless Suburban submits the engineering data required herein to support its assertion of poor signal quality from WYBE at Suburban's principal headend. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-4

In re Applications of

ATKINS BROADCASTING — File No. BRH-900327UP

For Renewal of License of
Station KRGN(FM)
Amarillo, Texas

CAPROCK EDUCATIONAL BROADCASTING FOUNDATION — File No. BRED-900327UQ

For Renewal of License of
Noncommercial Educational
Station KLMN(FM)
Amarillo, Texas

CAPROCK EDUCATIONAL BROADCASTING FOUNDATION — File Nos. BMPED-890726IF, BLED-901210KD

For Modification of Construction
Permit and For License to Cover
Construction of Noncommercial
Educational Station KAMY(FM)
Lubbock, Texas

SOUTHWEST EDUCATIONAL MEDIA FOUNDATION OF TEXAS, INC. — File No. BRED-900327UO

For Renewal of License of
Noncommercial Educational
Station KENT
Odessa, Texas

SOUTHWEST EDUCATIONAL MEDIA FOUNDATION OF TEXAS, INC. — File No. BLED-910705KA

For License to Cover
Construction of Noncommercial
Educational Station KENT-FM
Odessa, Texas

SOUTHWEST EDUCATIONAL MEDIA FOUNDATION OF TEXAS, INC. — File No. BPED-890313MD

For Construction Permit for a
New Noncommercial Educational FM
Station on Channel 290A at
Stanton, Texas

FAMILY STATIONS, INC.
Assignor

and — File No. BAPED-891130HR

SOUTHWEST EDUCATIONAL MEDIA
FOUNDATION OF TEXAS, INC.
Assignee

For Assignment of Construction
Permit for Noncommercial
Educational Station KBTT(FM)
Bridgeport, Texas

SOUTHWEST EDUCATIONAL MEDIA FOUNDATION — File No. BLED-900226KA

For License to Cover
Construction of Noncommercial
Educational Station KOJO(FM),
Lake Charles, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 1993; Released: September 1, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau

acting pursuant to delegated authority,[1] has before it a "Petition for Extraordinary Relief," filed May 3, 1993, and supplemented on June 23, 1993, by Atkins Broadcasting, Caprock Educational Broadcasting Foundation, Southwest Educational Media Foundation of Texas, Inc., and Southwest Educational Media Foundation (hereinafter "Atkins"). Atkins seeks permission to assign the license of Station KRGN(FM) to La Voz Del Salvacion ("La Voz"), and to assign the licenses of Stations KLMN(FM) and KENT and the permits of Stations KAMY(FM),[2] KENT(FM), and KOJO(FM) to Maranatha Radio, Inc. ("Maranatha").[3] Atkins proposes to sell the stations to Maranatha for $579,750, pursuant to the Commission's minority distress sale policy.[4] In addition, Atkins requests dismissal of SEMFOT's application for a new noncommercial educational FM station in Stanton and the application to assign to SEMFOT the permit for noncommercial educational station KBTT(FM), Bridgeport, Texas.

2. By *Hearing Designation Order and Notice of Apparent Liability for Forfeiture*, 8 FCC Rcd 674 (1993) (*"HDO"*), the Commission designated for hearing the above-captioned applications for alleged unauthorized construction and related misrepresentations. On March 30, 1993, Atkins filed a "Petition for Stay of Proceeding to Implement Distress Sale" to allow him time to assign the licenses and permits consistent with the minority distress sale policy. By *Order*, FCC 93M-137, released April 1, 1993, the Presiding Judge granted Atkins' petition, provided that he filed a petition for extraordinary relief together with applications for assignments of the affected licenses and petitions. On May 3, 1993, Atkins filed the required petition and applications. By *Order*, FCC 93M-278, released May 19, 1993, the Presiding Judge stayed the proceeding to allow the Bureau time to rule on Atkins' distress sale showing.

3. To qualify for distress sale relief, a licensee must show that the hearing has not yet commenced, that there is significant minority ownership in the proposed transferee, and that the station will be sold at a maximum of 75 percent of the fair market value as of the date of designation for hearing. *Lee Broadcasting Corp.*, 76 FCC 2d 462 (1980); *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978); and *Clarification of Distress Sale Policy*, 44 RR 2d 479 (1978). Thus, the buyer and the seller each retain an appraiser and each submit an appraisal of the fair market value of the station as of the date on which the license was designated for hearing. If the difference between the two appraisals is more than five percent of the average of the appraisals, the parties must jointly choose and retain a third appraiser. Then, the average of the three appraisals will constitute the station's fair market value. *Grayson Enterprises, Inc.*, 77 FCC 2d 156 (1980), as clarified by *Patrick Henry*, 79 FCC 2d 393 (1980). Finally, the appraisals must contain specific documentation and supporting computations. *Northland Television, Inc.*, 72 FCC 2d 51, 56 (1979), as further clarified in *Grayson*, 77 FCC 2d at 164.

4. The parties have met the threshold criteria for relief by distress sale. First, the hearing has not yet commenced. Second, Atkins has established that the proposed assignee, Maranatha, has significant minority ownership. Specifically, 100% of La Voz and two-thirds of Maranatha are owned by Jose Vega and Alex Ramirez, both of whom are Hispanic. Finally, the parties' methodology for determination of the stations' fair market value and establishment of the distress sale price substantially comports with the third Commission requirement.

5. With respect to the determination of the stations' fair market value, Atkins has submitted an appraisal for the stations by Jack Riley ("Riley"), an experienced broadcast broker and appraiser. To determine the fair market value of the stations, Riley considered replacement costs of station equipment for the noncommercial stations, sale prices of other stations in Amarillo and Odessa during the past five years,[5] the value of the Odessa real estate, and capitalized earnings. For the six stations, Riley determined that their fair market value was $1,208,000.

6. Maranatha has submitted an appraisal of the stations from the Dora-Clayton Agency, Inc., ("DCA") an experienced brokerage and appraisal firm. DCA, like Riley, considered replacement costs for the equipment of the noncommercial stations, recent sale prices of comparable commercial properties for KRGN and KENT, and the value of the Odessa real estate. However, DCA concluded that the fair market value of Atkins' stations was only $998,000.

7. The proposed sale price of $579,750 is less than 60 percent of the lower of the stations' appraisals.[6] Thus, the parties have established that the stations will be conveyed at a price which is well below the 75 percent maximum permitted by the Commission's minority distress sale policy.

8. As a final matter, the parties have disclosed all the facts and circumstances regarding the distress sale agreement, including the negotiations relating thereto and the consideration to be exchanged. *KND Corp.*, 48 RR 2d 631, 634 (1980). In addition, the assignment applications have been processed and the assignees have been found to be

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[1] *See Faith Center, Inc.*, 54 RR 2d 1286, 1287 n.11 (1983); *Minority Ownership in Broadcasting*, 92 FCC 2d 849, 859 (1982).

[2] By letter dated June 2, 1993, Brian Henegar submitted an informal objection to the assignment of the permit for Station KAMY, Lubbock. Henegar alleges that he requested a copy of the assignment application but was told he needed to contact Atkins' office in Bedford, Texas, or the Commission in order to obtain a copy. By letter dated June 4, 1993, Atkins explained that Henegar had called the station and asked that a copy of the application be mailed to him. Instead, station personnel called Henegar and told him he could come to the station to look at the application. Atkins further relates that Henegar did, in fact, view a copy of the application on June 4. Atkins' version of these events is not disputed by Henegar. Accordingly, we conclude that no violation of the public inspection file rule (Section 73.3527 of the Commission's Rules) occurred and that the informal objection should be denied.

[3] La Voz and Maranatha are controlled by the same persons. Hence, except where noted, we will refer to them collectively as Maranatha.

[4] See discussion at para. 3, *infra*.

[5] Although KENT is operated as a noncommercial station, it may be operated as a commercial station.

[6] Ordinarily, where the difference between the appraisals is more than five percent of the average of the appraisals, as it is here, a third appraisal must be submitted. However, where, as here, the sale price does not even approach the 75 percent maximum set by the Commission, no useful purpose would be served by requiring the parties to obtain a third appraisal. *KOZN FM Stereo 99, Ltd.*, 3 FCC Rcd 877, 878 n.3 (MMB 1988).

fully qualified to be Commission licensees.[7] Therefore, the Petition for Extraordinary Relief, as supplemented, the renewal applications for Stations KRGN and KENT, and the assignment applications for the stations to Maranatha shall be granted, subject to the condition that the contemplated assignments are, in fact, consummated within ninety (90) days of the release date of this *Memorandum Opinion and Order*. If the assignments are not consummated within the ninety (90) days, however, this proceeding will return to hearing status and the hearing proceedings will resume in accordance with the *HDO, Radio Station WTJH*, 97 FCC 2d 415, 422 (MMB 1984).

9. Accordingly, IT IS ORDERED that, subject to the condition imposed in paragraph 8 above, Atkins' "Petition for Extraordinary Relief," as supplemented, IS GRANTED; the informal objection to the application to assign the permit of Station KAMY(FM), Lubbock, Texas, IS DENIED; the applications for renewal of license of Station KRGN(FM) (File No. BRH-900327UP), Station KLMN(FM) (File No. BRED-900327UQ), and Station KENT (File No. BRED-900327UO) ARE GRANTED; the applications for assignment of license of Station KRGN(FM) (File No. BALH-930504GG), Station KLMN(FM) (File No. BALED-930503GG), and Station KENT (File No. BAL-930503EA), and the applications for assignment of the permits of Station KAMY(FM) (File No. BAPED-930503GH), Station KENT-FM (File No. BAPED-930503EB), and Station KOJO(FM) (File No. BAPED-930503GE) ARE GRANTED; the application of SEMFOT for a construction permit for a new station in Stanton, Texas (File No. BPED-890313MD) IS DISMISSED; the application to assign the permit of Station KBTT(FM) (File No. BAPED-891130HR) IS DISMISSED; and this proceeding IS TERMINATED.[8]

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[7] The assignment applications were accepted for filing by Public Notices, which were released May 11, 13 and 17, 1993. The only challenge to the applications was an informal objection against the KAMY assignment, which we have concluded does not warrant further action. (*See* n.2, *supra*.)

[8] *Faith Center, Inc.*, 54 RR 2d at 1287 n.11; *Minority Ownership in Broadcasting*, 92 FCC 2d at 859.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-177

In the Matter of

An Inquiry into the Commission's Policies and Rules regarding AM Radio Service Directional Antenna Performance Verification — RM-7594

ORDER GRANTING EXTENSION OF TIME

Adopted: August 19, 1993; Released: August 20, 1993

Comment Date: October 29, 1993
Reply Comment Date: December 29, 1993

By the Chief, Mass Media Bureau:

1. On June 14, 1993, the Commission adopted a *Notice of Inquiry*, 8 FCC Rcd 4345 (1993), ("NOI") in MM Docket No. 93-177 to examine the policies and rules pertaining to the performance verification of directional antenna systems at AM Broadcast Radio Service stations. Since those rules were established in the late 1930s, they have been amended many times, but the entire framework has never been comprehensively reexamined. The NOI initiates that broad review and seeks to identify those portions of the current rules affecting AM directional arrays which ought to be the subject of a Notice of Proposed Rule Making. The deadlines for filing comments and reply comments were, respectively, August 20, 1993 and September 7, 1993.

2. On July 12, 1993, the Association of Federal Communications Consulting Engineers ("AFCCE") requested an extension of the comment period. AFCCE is an association of consulting engineers, engineers employed by broadcast stations, networks and equipment manufacturers. AFCCE indicates that it will not be meeting during the summer and therefore will be unable to file comments on the established deadline. Thus, they request that the filing deadlines be extended by approximately 60 days.

3. Five consulting engineering firms that are members of AFCCE filed the petition that initiated this proceeding. The continued participation of those firms, of other AFCCE members, and of AFCCE as an organization should provide valuable assistance in our effort to update our AM directional antenna rules. We agree that it is important that the parties knowledgeable in this area have an adequate opportunity to base comments on a careful analysis of the issues. Therefore, we are persuaded that the extension now under consideration should be approved.

4. Accordingly, IT IS ORDERED THAT the request to extend the comment date filed July 12, 1993 by the Association of Federal Communications Consulting Engineers IS GRANTED. The date for filing comments in this proceeding IS EXTENDED to October 29, 1993 and the date for filing reply comments IS EXTENDED to December 29, 1993.

5. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, 1.45 and 1.46 of the Commission's Rules.

6. Further information may be obtained from Joe Johnson, Mass Media Bureau, Engineering Policy Branch, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Golden West Telecommunications Cooperative, Inc.

Petition for Waiver of Sections 61.41(c), 61.41(d), 69.3(e)(11) and 69.3(i)(4) of the Commission's Rules.

ORDER

Adopted: August 20, 1993; Released: August 20, 1993

By the Acting Chief, Common Carrier Bureau:

1. On June 2, 1993, Golden West Telecommunications Cooperative, Inc. (Golden West) filed a petition for waivers of Sections 61.41(c), 61.41(d), 69.3(e)(11) and 69.3(i)(4) of the Commission's rules[1] in conjunction with its acquisition of Contel of South Dakota from GTE Corporation (GTE). The rule waivers would: (1) allow Contel of South Dakota to be regulated under rate of return, rate base regulation instead of price cap regulation; (2) place Contel of South Dakota's cost in the National Exchange Carrier Association (NECA) pools effective September 1, 1993; and (3) allow Golden West to avoid the application of price cap regulation to itself for interstate services. Comments in support of Golden West's petition were filed on July 12, 1993 by NECA, the National Telephone Cooperative Association (NTCA) and by the United States Telephone Association (USTA). No replies regarding the petition were filed. For the reasons discussed below, we grant the waivers to the extent indicated.

2. Golden West states that on March 10, 1993 it, and Golden West's wholly owned subsidiary, Golden West Telephone Properties, Inc. (Golden West TP), entered into a stock purchase agreement with Contel Corporation (Contel) and GTE for the sale of all of the outstanding stock of Contel of South Dakota, Inc. to Golden West TP.[2] Golden West further states that Contel of South Dakota provides local exchange service to approximately 8,050 access lines, and that Golden West currently serves approximately 11,000 access lines in South Dakota.[3]

3. Golden West states that it concurs in the NECA common line and traffic sensitive pools as a cost company, and that Contel of South Dakota is subject to price cap regulation.[4] Golden West asserts that the grant of the requested waivers is in the public interest because due to its small size relative to exchange carriers subject to price caps, Golden West would not be capable of filing its own rates or maintaining price cap indexes.[5] Golden West argues that grant of the waivers will allow it to be more efficient in managing its business, providing customer service, and offering intraLATA equal access.[6] Golden West also contends that grant of its request would be consistent with prior waivers granted by the Bureau, with the Commission's price cap policies, and with its regulation of small telephone companies.[7] Finally, Golden West requests expedited treatment of its petition so that it may meet its planned service commencement date of September 1, 1993.[8]

4. In support of the Golden West petition, USTA argues that Golden West will make substantial investments in terms of upgrades to the acquired facilities, equipment, software and staffing. Thus, USTA asserts, the public interest will be served by the efficiencies gained in management and customer service, and the introduction of intraLATA equal access.[9] NECA contends that small companies should not incur filing fees, time delays or administrative burdens when conducting normal purchases or sales of telephone properties. NECA further asserts that the transaction will have a *de minimis* effect on the NECA pools, and will not impose significant administrative burdens on NECA.[10] NTCA asserts that, all of Golden West's customers will benefit in the long run by the larger customer base over which to spread common overhead costs.[11]

5. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[12] In the absence of the rule a company might attempt to shift costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more because of its greater revenue requirement) while generating greater earnings for the price cap affiliate without triggering the sharing mechanism. Also, if a LEC were allowed to alternate between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price caps which rewards carriers for mak-

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[1] 47 C.F.R. §§ 61.41(c), 61.41(d), 69.3(e)(11) and 69.3(i)(4).

[2] Contel of South Dakota, according to Golden West, will continue to operate as a local exchange company wholly owned by Golden West TP, and will operate separately from Golden West.

[3] Golden West Petition at 2-3.

[4] *Id.* at 3.

[5] *Id.* at 11-12.

[6] *Id.* at 11; *see also* USTA Comments at 2-3; NECA Comments at 2-4 (intraLATA equal access capabilities will be available through Golden West's participation in South Dakota Network, Inc.'s centralized equal access facilities).

[7] *Id.* at 8-11.

[8] *Id.* at 13-14.

[9] USTA Comments at 2; NECA Comments at 2.

[10] NECA Comments at 3-4.

[11] NTCA Comments at 2.

[12] Section 61.42(c)(2) of the Commission's Rules, 47 C.F.R. § 61.42(c)(2). Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990), *modified on recon.*, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order).*

ing efficiency gains.[13] The Commission stated, however, that "in some cases, the efficiencies created by the purchase and sale of one or two exchanges may outweigh the threat of gaming the system. Such cases might justify a narrow waiver of the all-or-nothing rule."[14]

6. We conclude that there is good cause to grant petitioner a waiver of Section 61.41(c) and (d) of the Commission's rules to permit Contel of South Dakota to avoid price cap regulation under its new ownership. The first concern identified by the Commission in adopting these rules -- cost-shifting between affiliates -- is not at issue here. Golden West is not seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rules -- allowing a company to use mergers and acquisitions as a means of "gaming the system" -- is also not raised in this case. GTE will remain regulated under price caps; it retains no ownership over Contel of South Dakota that would permit it to convert this property back into a price cap exchange. In addition, Golden West has stated its intention not to elect price caps, asserting that it will remain under rate of return regulation.[15]

7. Further, the Commission has always been sensitive to the administrative burdens imposed on small carriers by the application of Commission rules.[16] In the *LEC Price Cap Order*, the Commission recognized that small telephone companies should not be forced into a regulatory regime that was designed largely on the basis of historical performance by the largest local exchange carriers.[17] The Commission therefore made price cap regulation optional for smaller carriers. Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Operating Companies, our application of the all-or-nothing rule must take into account the Commission's concerns about applying the price cap system to small carriers.

8. We therefore grant a waiver of the all-or-nothing rule. Our waiver of Section 61.41 (c) and (d) allows the property purchased by Golden West to become subject to rate of return regulation. Because Golden West does not serve more than 50,000 access lines, it does not require a waiver of Section 69.3 to re-enter the NECA pools.[18]

9. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 4(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, that the petition of Golden West Telecommunications Cooperative, Inc., for waiver of Sections 61.41(c) and (d) of the Commission's Rules, 47 C.F.R. § 61.41(c) and (d), IS GRANTED.

10. IT IS FURTHER ORDERED that the petition of Golden West Telecommunications Cooperative, Inc., for waiver of Sections 69.3(e)(11) and 69.3(i)(4) of the Commission's Rules, 47 C.F.R. § 69.3(e)(11) and (i)(4), IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

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[13] *See LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2706.

[14] *Id.* at n.207.

[15] Golden West Petition at 6.

[16] *See, e.g.*, Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, Report and Order, 8 FCC Rcd 4545 (1993), *petitions for recon. pending;* and Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rulemaking, 2 FCC Rcd 1010 (1986); Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988).

[17] Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, 5 FCC Rcd 6786 (1990) and *Erratum*, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modified on recon.*, 6 FCC Rcd 4524 (1991) (*ONA/Part 69 Order*), *appeals of LEC Price Cap Order affirmed sub nom., National Rural Telecom Association v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

[18] *See* 47 C.F.R. § 69.3(g)(2).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 20, 1993

PUBLIC INFORMATION COLLECTION REQUIREMENT SUBMITTED TO OFFICE OF MANAGEMENT AND BUDGET (OMB) FOR REVIEW

The Federal Communications Commission has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1980, 44 U.S.C. 3507. Persons wishing to comment on this information collection should contact Jonas Neihardt, Office of Management and Budget, Room 3235 NEOB, Washington, DC 20503, telephone (202) 395-4814. For further information contact, Judy Boley, Federal Communications Commission, telephone (202) 632-7513.

Please Note: The Commission has requested emergency review of this item by August 20, 1993, under the provisions of 5 CFR 1320.18.

Title: In the Matter of Commission Requirements for Cost Support Material to be Filed with Local Transport Access Tariffs

FCC Form No.: None

Action: New Collection

Respondents: Businesses or other for profit.

Frequency of Response: One time.

Estimated Annual Burden: 140 responses; 12 hours per response; 1680 total annual burden.

Needs and Uses: The data collection requirements set forth in the Commission Requirements for Cost Support Material to be Filed with Local Transport Access Tariffs Order will be used to aid in the review of the local exchange carriers' transport rate restructure tariff filings by the Commission and interested parties.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 19, 1993

Waiver of Transport Orders filed by
Rochester Telephone Corporation (Rochester)
and Any Others

Pleading Cycle Established

COMMENTS: October 7, 1993
REPLY COMMENTS: October 25, 1993

On August 10, 1993, Rochester Telephone Corporation (Rochester) petitioned for waiver of portions of the Commission's Transport Rate Structure and Pricing, CC Docket No. 91-213, *First Memorandum Opinion and Order on Reconsideration*, FCC 93-366 (released July 21, 1993) (*First Reconsideration Order*). Petitioner seeks waiver of the requirement that local exchange carriers (LECs) use base year 1992 demand, without taking into account anticipated network reconfiguration by interexchange carriers (IXCs), in calculating the revenues that would be received from each of the facilities-related rate elements in computing the rate for the interconnection charge element.

Petitioner requests that the Commission permit it to develop its transport interconnection rate in accordance with the methodology specified in Transport Rate Structure and Pricing, CC Docket No. 91-213, *Report and Order and Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7006 (1992) (*Report and Order*).

Petitioner explains that in the *Report and Order*, the Commission permitted LECs to utilize demand forecasts, after IXCs reconfigure their use of LEC access facilities, in making these calculations. Under this rate development methodology, Petitioner anticipated restructuring its switched transport rates in essentially a revenue neutral manner.

Petitioner claims that the methodology adopted in the *First Reconsideration Order* works a unique and disproportionate hardship on it because at present, Petitioner has no demand for dedicated end office facilities for switched transport traffic. All of its interstate switched access traffic is carried over common transport facilities from its end offices to its access tandem. Therefore, the change in the rate development methodology set forth in the *First Reconsideration Order* will cause Petitioner to greatly overstate the revenue it will receive from the common transport and tandem rate elements. Petitioner anticipates a resulting immediate reduction in its switched transport revenues of approximately $1.02 million, or 15.11%, under the methodology set forth in the *First Reconsideration Order*.

Petitioner believes it is the only Tier 1 exchange carrier that has historically experienced no demand for direct end-office transport. Petitioner also states that it is not clear that the Commission's mid-course correction as written will apply to Petitioner and that potential remedy is inadequate in any event under these circumstances.

Interested parties may file comments regarding the Rochester petition or any other petitions for waiver of the transport rate restructure and should consolidate such comments on or oppositions to the waiver requests with their petitions to reject or suspend and investigate the tariffs.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at is office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20054.

For further information, contact Barbara S. Esbin, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August, 25, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AT&T'S PETITION FOR LIMITED WAIVER OF COMPUTER II CPE UNBUNDLING AND DETARIFFING REQUIREMENTS

On August 6, 1993, American Telephone and Telegraph Company (AT&T) filed a petition requesting a limited waiver of the customer premises equipment (CPE) unbundling and detariffing requirements for its Partners in Business Program. AT&T states that the Partners in Business program is a reward program that enables customers to earn points that can be redeemed for a variety of offerings. AT&T states that the redemption offers currently available include travel awards, training, consulting, advertising, network management, and 800 service optional features. AT&T would like to include CPE in the available offerings.

AT&T argues that the application of the unbundling and detariffing rule with respect to the Partners in Business Program is not in the public interest because it conflicts directly with customers' requests for CPE and it reduces the options available to customers. AT&T states that any bundled redemption offers will only be offered by AT&T in full compliance with the Commission's accounting safeguards.

Interested parties are to file comments on this petition by **September 14, 1993,** and reply comments by **September 29, 1993,** with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Commission Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-76

In the Matter of

Amendment of the Commission's
Rules to Establish Rules and
Policies Pertaining to a Non-Voice,
Non-Geostationary Mobile-Satellite Service

NOTICE OF PROPOSED RULEMAKING

Adopted: January 14, 1993; Released: February 10, 1993

Comment Date: April 26, 1993
Reply Comment Date: May 26, 1993

By the Commission:

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I. INTRODUCTION

1. The Commission has proposed the allocation of certain frequencies for a new, non-voice, non-geostationary orbit mobile-satellite service (NVNG MSS).[1] This *Notice of Proposed Rulemaking* (*Notice*) proposes rules to govern this service.

II. BACKGROUND

2. At the World Administrative Radio Conference in February, 1992 (WARC-92), the 137-138 MHz, 148-150.05 MHz and 400.15-401 MHz frequency bands were allocated on a worldwide primary shared basis to a non-geostationary mobile-satellite service.[2] The Commission today allocates these frequencies, as well as the 399.9-400.05 MHz frequency band, to a new domestic NVNG mobile-satellite service.[3] The NVNG MSS is a mobile-satellite service[4] reserved for use by non-geostationary satellites in the provision of non-voice communications.

3. A cut-off date was established for the filing of applications to provide mobile-satellite services in these bands, and timely applications were filed by VITA, STARSYS and ORBCOMM. ORBCOMM and STARSYS propose to provide low-cost, commercial radiolocation and two-way data messaging services in these frequency bands, using low-Earth orbiting satellite constellations of up to 24 satellites. Utilizing small, inexpensive transceivers these systems will allow subscribers to send and receive short data messages to and from any other location in the country.[5] These systems may ultimately be used to provide a number of diverse services, including emergency location services in remote areas, vehicle tracking and monitoring, envi-

[1] Notice of Proposed Rulemaking, 6 FCC Rcd 5932 (October 18, 1991) (*Allocation NPRM*). A *Report and Order* allocating these frequencies to the NVNG MSS is being adopted concurrently with this *Notice*. The *Allocation NPRM* was adopted in response to a Petitions for Rulemaking and NVNG MSS applications filed with the Commission by Orbital Communications Corporation (ORBCOMM), CCB File No. 22-DSS-P90(20) (February 28, 1990) RM-7334; STARSYS Global Positioning, Inc. (STARSYS), CCB File No. 33-DSS-P90(24) (May 4, 1990) RM-7399; and Volunteers in Technical Assistance (VITA), CCB File No. CSS-91-007(3) (September 20, 1990) RM-7612. A fourth NVNG MSS application, filed by LEOSAT Corporation (LEOSAT), was dismissed for failure to submit an FCC Fee Processing Form 155. LEOSAT Corporation, 7 FCC Rcd 2469 (CCB 1992), *recon. pending*.

[2] The 149.9 MHz-150.05 MHz band is allocated to land mobile-satellite service (Earth-to-space) on a secondary basis until January 1, 1997 (ITU International Radio Regulation (RR) Add. 609B). At that time, the allocation for land-mobile satellite service will become primary. The frequency bands 137.025-137.175 MHz and 137.825-138 MHz are allocated on a secondary basis to non-geostationary mobile-satellite service.

[3] *Report and Order, supra*, at n.1. The 399.9 MHz-400.05 MHz band was proposed to be allocated to mobile-satellite service in either the space-to-Earth or the Earth-to-space direction, but not both. The allocated NVNG MSS frequency bands are used by the Federal government for terrestrial and/or space services.

[4] This may include satellite links between land earth stations at fixed locations. *See* proposed Section 2.1 in Appendix A, *infra*.

[5] Although STARSYS and ORBCOMM are requesting domestic authority, their proposed non-geostationary systems are inherently global in nature and are capable of providing international and/or foreign domestic service. VITA seeks only international authority at this time. We propose that the rules and policies in this *Notice* apply to all NVNG MSS applicants, regardless of whether they propose to provide domestic or international service.

ronmental data collection and time-sensitive business and personal data communications. VITA proposes to implement a non-profit, two-satellite system that will be used to provide educational, health, environmental and disaster relief services to developing countries through a store-and-forward operational configuration.

4. On April 16, 1992, the Commission announced its preliminary intent to establish NVNG MSS regulations and licensing policies through a negotiated rulemaking proceeding. Negotiated rulemaking involves the solicitation of input from affected parties, meeting as a Federal Advisory Committee,[6] prior to the Commission's proposal of rules. Through negotiated rulemaking, the Commission hopes to achieve better, less contested, regulations by involving interested parties in a face-to-face, pre-rulemaking process of cooperation and discussion.

5. Prior to the Commission decision to convene an advisory committee, ORBCOMM, STARSYS and VITA jointly submitted proposed rules to govern the NVNG mobile-satellite service.[7] Because of unanswered concerns regarding their ability to co-exist within the allocated spectrum (with each other and/or with existing terrestrial users of the bands), and because the extent of any future competitive entry in this service had not been fully explored, the Commission determined that a brief negotiation period among the interested and affected parties would be in the public interest. Accordingly, on July 27, 1992, the Commission announced its intent to proceed with the formation of a pre-rulemaking advisory committee (Committee) in accordance with the Negotiated Rulemaking Act of 1990.[8] The Committee, which was comprised of representatives of existing users of the frequencies, potential band users and adjacent band users, held its first meeting on August 10, 1992.[9]

6. Over the course of its 37 day charter period, the Committee and its informal working groups met on an almost daily basis and negotiated a series of comprehensive technical rules and licensing policy recommendations for the NVNG mobile-satellite service. In accordance with the Negotiated Rulemaking Act, the Commission proposes the Committee's recommended technical rules, adopted by unanimous consent of the members, as the basis for this *Notice*. Commission staff was represented on the Committee, and upon review, we believe that the Committee's recommended regulations and policy suggestions are in the public interest and consistent with our legal and other obligations. Accordingly, the technical regulations recommended by the Committee, along with other proposed service rules, are presented here for notice and comment by interested parties.[10]

III. DISCUSSION

A. System Design Requirements

7. A stated objective in this proceeding has been to establish regulations and policies that will allow multiple entrants into the NVNG MSS market, to the maximum extent possible.[11] The system proponents represented on the Committee[12] agree that sharing of the available spectrum with future systems is possible[13] but they note, and we concur, that only actual operating experience in the frequency bands will make possible a realistic determination of the size and type of future system(s) that can be accommodated.[14] Since sharing among the three applicants appears feasible,[15] and since some room appears to exist for future entrants, we believe it is unnecessary, or at best premature, to mandate an accessing and modulation technique to be used in this service,[16] or to otherwise divide the allocated spectrum in a particular manner among the applicants. Such requirements would unduly inhibit the flexibility of the commercial applicants to design and operate systems in the manner that they deem most appropriate.[17] Absent a compelling showing that a particular sharing proposal represents a truly workable, and most efficient, use of the spectrum, and is needed to accommodate the applicants before us, we believe that such regulation is not in the public interest. We therefore propose to require NVNG MSS applicants to identify the exact frequencies to be used by each system, including specific frequencies for feeder link operations.[18] These frequencies will then be assigned to the operators in the licensing process. This will allow the Commission to determine the availability of spectrum for future users and assure both maximum spectrum efficiency and minimum interference to other users of the bands.

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[6] *See* Federal Advisory Committee Act, 5 U.S.C. App. 2.

[7] Jointly Filed Comments of ORBCOMM, STARSYS and VITA, dated May 18, 1992 (Joint Comments).

[8] Negotiated Rulemaking Act of 1990, Pub.L. 101-648, November 28, 1990.

[9] A list of Committee members is attached as Appendix 2 to the Report of the Below 1 GHz LEO Negotiated Rulemaking Committee, dated September 16, 1992, (Committee Report) CC Docket 92-76.

[10] Certain service and basic qualification rules, also proposed here, were not considered by the Committee because the Commission is best qualified to make these determinations. As an additional matter, a rule change unrelated to NVNG MSS is proposed. *See* Appendix A, proposed amended Section 25.151 (c)(5), which provides that public notice will not normally be issued for receipt of applications for assignment or transfer of control of space station authorization where such assignment or transfer of control does not involve a substantial change in ownership or control. We invite comment on this proposal.

[11] Notice of Advisory Committee, 57 Fed. Reg. 33163 (July 27, 1992).

[12] System proponents represented on the Committee were LEOSAT, ORBCOMM, STARSYS and VITA.

[13] Allocated spectrum for this service consists of 3.45 MHz as co-primary and 475 kHz as secondary. Some of these frequencies will be immediately available only on a non-interference basis with certain existing terrestrial services and meteorological and navigation satellite systems. *See* Committee Report, *supra*, at p. 7.

[14] Committee Report, *supra*, at pp. 7-9.

[15] *Id.*

[16] This is particularly important in view of concerns raised by ORBCOMM regarding the ability of CDMA systems, such as the one proposed by STARSYS, to operate effectively in the allocated bands given the existing terrestrial environment.

[17] The Commission attempts, whenever possible, to permit domestic satellite licensees flexibility in the technical designs of their systems. *See, e.g.*, Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6972 (1988) (*1988 Assignment Order)* at para. 2; *see also* Domestic Fixed-Satellite Service, 88 FCC 2d 318 (1981).

[18] *See* paragraphs 11-12, *infra*.

B. Spectrum Efficiency Requirements

8. Although the Committee recommends that the Commission consider in some manner the spectrum efficiency of each proposed NVNG MSS system, it is apparent that the spectrum efficiency of a non-geostationary satellite system is difficult to establish on a normative basis. In the geostationary fixed-satellite services, spectrum efficiency may be reasonably assured by a requirement that satellites adhere to a state-of-the-art equipment, full-frequency reuse standard. Non-geostationary satellite services, however, may employ state-of-the-art equipment, but the non-directional mobile earth station antennas they use may prevent NVNG MSS systems from providing efficient services compared with those provided by, for example, the fixed-satellite service which uses directional antennas; nor will the imposition of requirements such as service coverage (*i.e.* a requirement that a system provide domestic coverage for a specific percentage of time) necessarily ensure the efficient provision of NVNG MSS services. The imposition of minimum domestic coverage requirements would require the Commission to estimate an applicant's commercial plans: certain types of services require a high percentage of coverage time to be effectively provided,[19] and some do not. [20] Accordingly, there is no consensus among system proponents as to a specific efficiency criterion or its applicability.[21]

9. Among the options explored by the Committee was the need for satellite station keeping, an orbit management technique that enables system operators to maintain the relative position of each satellite within a constellation.[22] At this time, however, we cannot predict the exact orbit perturbations and the relative change in service quality that is likely to occur if station keeping is not required. It is equally unclear whether continuous coverage is essential to the success of these systems, or whether there is also a need for types of systems that may provide less expensive store-and-forward services. In light of these uncertainties, we believe that adoption of a specific spectrum efficiency proposal is inadvisable.[23] The Committee determined that there is adequate spectrum available to accommodate all the applicants, with room left over for future entry. Experience suggests that if a market for services exists, the providers will maximize their available coverage and potential to meet the market demands accordingly.[24]

10. We intend, however, to examine carefully future applications for new systems and applications for replacement systems to ensure that such systems will be operated efficiently in light of technical and other conditions existing at the time of filing. To assist us in making such determinations, and to monitor the evolution and operation of this new service, we propose a rule that imposes a semi-annual reporting requirement on all NVNG MSS licensees. This proposed Section 25.142(c), which is analogous to a similar requirement placed upon fixed-satellite licensees, essentially solicits the following information: the status of satellite construction and launch, a description of any significant space station outages, a description of system utilization and identification of satellites taken out of service.

C. Feeder Link Requirements

11. Three of the system proponents represented on the Committee identified requirements for spectrum within the allocated bands for narrowband "feeder" link or "gateway" link operations.[25] The proponents do not believe, however, that it will be possible for NVNG MSS systems to share feeder link frequencies with each other or with their mobile operations. A number of these systems will require continuous communications between an operational spacecraft and at least one gateway earth station to provide for the real time relay of messages between users and the gateway. Multiple satellites within a single system will, at times, appear in the beam width of a gateway earth station antenna. This will occur because some satellites will pass relatively close to other satellites, with one satellite on an ascending pass, and another satellite from the same system (but from a different orbital plane) on a descending pass. Nor will it be possible to utilize feeder link earth station antenna discrimination to minimize these occurrences, because in these frequencies the broad main beams of the antennas will be in the range of 20 to 25 degrees.

12. Within a system, it will be possible to coordinate these instances of multiple satellites within the beam width of a gateway antenna through the use of modulation, pack-

[19] *E.g.* 24-hour, two-way messaging services.

[20] *E.g.* store-and-forward data retrieval services, meteorological data collection.

[21] Suggestions explored by the Committee included satellite station keeping requirements, minimum percentage of domestic coverage and the effectiveness of a system design to meet its stated commercial objective.

[22] The external forces that perturb a satellite's position are atmospheric drag and solar radiation pressure. These two forces reduce the altitude of the orbit by removing energy from the moving satellite. As the orbit becomes smaller, the orbital period also reduces, causing the relative position of the satellite in the constellation to change. Eventually, the placement of satellites within the constellation will no longer be uniform. This may result in gaps in the constellation without satellite accessibility and the quality of service to the general public could be altered. Hence, there may be a need to maneuver the satellite to correct the orbit when external forces have changed the altitude. This could be done by on-board thrusters to compensate for atmospheric drag and solar radiation pressure, which would require additional spacecraft weight for fuel and the electrical/mechanical complexity of the thruster.

[23] However, there may be a need for orbit maintenance requirements in the future to accommodate additional systems. This is particularly true for small systems not fully utilizing the orbit resource. We will address these issues if the need arises.

[24] In establishing regulations and licensing procedures for other satellite services, we have determined that competition in new services will provide effects that serve the public interest. *See, e.g.,* Second Report and Order in Gen. Docket 84-689/690 (*Radiodetermination Satellite Service Licensing Order),* 104 FCC 2d 650, 654 (1986). The courts have endorsed this concept, noting that competitive market forces may achieve the same public policy goals that detailed administrative regulations are designed to achieve. *See, e.g.,* United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980); Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982). We believe that benefits, such as maximized spectrum efficiency, can be achieved by crafting licensing policies that allow technical flexibility in the provision of NVNG mobile-satellite services.

[25] A feeder link is a radio link from an earth station at a given location to a space station, or vice versa, conveying information for a space radiocommunication service other than for the fixed-satellite service. The given location may be at a specified fixed point, or at any fixed point with the specified areas. 47 C.F.R. § 2.1.

et rates and signalling techniques.[26] During the period of near-conjunction of the two satellites, however, the maximum uplink data rate must be shared by both satellites, briefly reducing the system capacity. Such brief periods of reduced capacity can be tolerated within a system because the operators will know in advance when such reductions will occur, through station keeping and tracking. While the proponents believe that sharing of the feeder link spectrum among satellites in the same system will be an efficient use of this spectrum,[27] they indicated that it will be practically impossible to share feeder link spectrum with another system.[28] Accordingly, we do not propose to adopt rules that address feeder links separately. Applicants will determine the location of feeder links within the allocated spectrum on a coordinated basis with other authorized NVNG MSS satellite providers and with other users of the band.

D. Allocation Issues

13. The Committee recommends that the text of certain international Radio Regulations footnotes, adopted at WARC-92, as well as the text of a new footnote limiting the use of these frequencies to NVNG MSS, be added to the domestic Table of Frequency Allocations, 47 C.F.R. § 2.106. We will not propose these changes in the context of this proceeding. Rather, these issues have been addressed in a related *Report and Order* on frequency allocation matters adopted today in ET Docket 91-280.

E. Space Station Application Requirements

14. The Commission proposes adoption of a new Section 25.142(a) to Part 47 of the Commission's rules and regulations, listing the space station application filing, and certain operating, requirements for NVNG MSS systems. In addition to referencing the information required by Section 25.114, the proposed section calls for information regarding the number of proposed space stations, the altitude(s), argument(s) of perigee, service arc(s), right ascension of ascending node(s), and eccentricity and inclination of the system's space stations. The proposed rule also requires applicants to file information demonstrating that their systems will not cause unacceptable interference into any authorized NVNG MSS system.[29] This demonstration must be based on information publicly available at the Commission at the time the application is filed.

15. This proposed section further requires NVNG MSS applicants to identify power flux densities produced at the Earth's surface by each space station in certain frequency bands. This will allow a determination of whether coordination with terrestrial services is required under footnotes 599A and 647X of Section 2.106 of the Commission's Rules.[30] Applicants must also identify measures they will employ to protect radio astronomy services in the adjacent 150.05-153 MHz and 406.1-410 MHz bands.

16. Finally, the Committee suggests that the frequency spectrum can be shared with the terrestrial and other space services using both spread spectrum and frequency separation techniques. Using these techniques in the uplink direction, the spacecraft will receive the desired uplink signals from the mobile terminals and, within the pass band of the satellite receiver, signals emanated from all terrestrial transmitters within view of the satellite. Should a satellite utilize a bent-pipe type of transponder, the unintended terrestrial signals in the uplink would be retransmitted by the satellite in the downlink transmission. These retransmitted terrestrial signals could cause harmful interference to the co-primary services sharing the downlink frequency band. In order to avoid this undesired effect, we propose a new Section 25.142(a)(3) which stipulates that an applicant must demonstrate that no signal received by a satellite from a source outside of the system shall be retransmitted.

F. Financial Qualifications

17. The Commission traditionally requires satellite applicants to demonstrate their financial ability to construct, launch and operate their systems. Examination of an applicant's financial qualifications ensures that the orbit-spectrum resource is not tied up by entities unable to fulfill their plans, discourages the filing of speculative applications that occupy Commission resources, and promotes the prompt availability of service to the public. We have noted, however, that this general principle must be considered in the context of the specific service to be provided. NVNG MSS is a new, innovative and as yet commercially unproven service. Applicants without substantial internal assets may have difficulty obtaining the financing necessary to construct, launch and operate a large system years before that system is to be operational.

18. To ease this difficulty, the applicants suggest that they be allowed to obtain financing for their project in stages. We have attempted to implement two-stage financial showings in other domestic satellite services, but have seen no enhancement of the ability of tentative licensees to secure necessary funding.[31] Moreover, while we can accommodate all the current applicants, as well as some future entrant(s), the capacity for additional entry is not clear. We are hesitant to suggest a standard that may preclude future entry by willing and able applicants while NVNG MSS

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[26] ORBCOMM, for example, will use a frequency division multiple access (FDMA)/time division multiple access (TDMA) uplink format that will permit such intrasystem reuse of the 50 kHz gateway link spectrum.

[27] The intrasystem coordination effectively results in multiple reuse of the frequencies.

[28] In order for multiple NVNG MSS systems to share the same gateway uplink spectrum, it would be necessary for them to pre-coordinate on an uplink signal structure, including packet rates, modulation techniques and signalling techniques. It would also be necessary to attempt to coordinate actual frequency use operationally on a real time basis, since there would be times when there would be a need to share the uplink data rate among numerous satellites (two or more from each system), thereby effectively resulting in system outages. However, such intersystem operational coordination would be difficult since the satellites from the different systems will not be station-kept with respect to each other. The arguments of perigee and right ascension of ascending nodes will be uncoordinated, and will precess at different rates, making simultaneous visibility a likely but random event with respect to the busy hours of traffic loading.

[29] Proposed Section 25.142(b)(3) states that existing permittees and licensees shall seek in good faith to accommodate future entry through coordination.

[30] WARC-92 adopted RR 599A, which stipulates that NVNG MSS is required to coordinate with terrestrial services if the power flux density exceeds -125 dB (W/m2) in any 4 kHz.

[31] *See, e.g.* Advanced Business Communications, Inc., 100 FCC 2d 525 (released February 27, 1985); Rainbow Satellite, Inc.,

licensees continue a prolonged attempt to procure financing. Instead, we propose to require an applicant to show that it is financially capable of constructing, launching and operating a portion of its system prior to authorization. It appears that the system operators will be able to perform certain of their proposed services, such as remote environmental data collection, wildlife or vehicle tracking, and routine messaging from remote areas, for example, with as few as two satellites.[32] We thus propose to require NVNG MSS applicants to demonstrate that they have current assets, or irrevocable commitments, sufficient to meet the costs of constructing, launching and operating a minimum two-satellite system for one year.[33] This showing will assure the public of the availability of certain service options while providing the licensee with some additional time to procure full financing. We request comment regarding this proposal, including whether sufficient service may be offered by a two-satellite system to promote the public interest in granting licenses to financially qualified applicants.

G. System License and License Terms

19. Geostationary satellites are licensed individually at specific orbit locations for terms of ten years.[34] In the NVNG MSS, however, an individual satellite is unlikely to be able to perform the proposed functions of the entire system. Indeed, entire satellite constellations will often be necessary to provide the services proposed. Because a minimum number of satellites must be launched and operational before an NVNG MSS system can completely fulfill its purpose, the applicants have suggested that their entire systems be licensed for ten years, commencing on the date that this minimum number of satellites is in operation. In view of the generally large number of identical space stations proposed by the applicants, we believe that a "blanket" system authorization may result in reduced administrative costs and processing delays.[35] Accordingly, we propose that NVNG MSS applicants be authorized to construct, launch and operate a system consisting of a specified number of technically identical space stations. We do not propose to require separate applications for authority to replace space stations during the license term with technically identical counterparts. Rather, we suggest that a licensee certify to the Commission, at least 30 days prior to launch, that (1) it intends to launch a space station that is technically identical to those authorized by the Commission and (2) launch of this space station will not cause the licensee to exceed the number of operating space stations authorized.[36]

20. The applicants' suggestion to commence license terms following the launch of a minimum number of space stations, however, runs afoul of our statutory mandate. Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. § 301, states that no person shall use or operate any apparatus for the transmission of communications by radio except with a license granted pursuant to the Act. Section 307(c) of the Act limits the length of such a license to ten years. Accordingly, we propose to issue a permit for the construction and launch of the proposed space station system and, when the first of those space stations is launched and ready to transmit, to license the entire NVNG MSS system for a period of ten years commencing upon the date that the authorization is granted. The authority to operate any additional or replacement satellites launched within that ten year time frame would likewise expire at the end of the system authorization.

21. The applicants have suggested that we include a rule embodying a replacement expectancy, pursuant to which an existing operator will receive system replacement authority absent any egregious conduct on its part.[37] As we have stated before, we believe that, given the large capital investment necessary to develop and operate satellite systems, there should be some assurance that operators will be able to continue to serve their customers.[38] However, the Commission may be unable to grant replacement system licenses in the future because of changed international agreements or domestic policy. Further, such a codified expectancy would prematurely tie us to a set of criteria for replacement authorization that may prove inappropriate as the service develops.[39] Accordingly, we do not propose to include a replacement expectancy rule at this time. We do intend generally to authorize replacement systems to successful applicants as long as the desired frequencies remain available for use by U.S. systems with comparable technical characteristics.

22. We are also proposing, based upon the Joint Comments, imposition of a filing window for system replacement authorization. *See* proposed § 25.120(e). This section would require licensees to file system renewal applications no earlier than 90 days, and no later than 30 days, prior to the end of the seventh year of the existing system license.

Mimeo No. 2584 (released February 14, 1985); United States Satellite Systems Inc., Mimeo No. 2583 (released February 14, 1985) (fixed-satellite service applicants failed to obtain necessary financing, and authorizations nullified, even after extensions of time had been granted.) Indeed, even the second stage of the applicants' proposed two-stage financial does not mandate a concrete demonstration of financial capability. *See* Joint Comments *supra*.

[32] A two-satellite constellation could provide approximately 10% communications capability within U.S. borders. This would mean that an NVNG MSS space station would be domestically accessible approximately every one to two hours for a period of between five and ten minutes.

[33] *See* proposed § 25.142(a). This financial qualification showing will essentially be identical to the one currently required by Section 25.140 of the Commission's Rules, 47 C.F.R. §25.140, for domestic fixed-satellite applicants.

[34] 47 C.F.R. § 25.120(a).

[35] *See*, Routine Licensing of Large Networks of Small Antenna Earth Stations, 51 Fed. Reg. 15067 (April 22, 1986).

[36] *See* proposed § 25.142(a)(5). Requests for authority to construct additional or non-conforming space stations within the license term would be treated as requests for license modification.

[37] In the domestic fixed-satellite service, we have refused to codify such a replacement expectancy. *See, e.g., 1988 Assignment Order, supra*.

[38] *1988 Assignment Order, supra*, at n.31. *See also*, Licensing of Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (1985), at para 7.

[39] In the *1988 Assignment Order, supra*, at n.31, we similarly noted that various intervening circumstances or conditions may inhibit our grant of replacement authority to existing systems, including the need to implement changed satellite policy or the proposed system's inability to coordinate successfully with other systems. The satellite system may further need to be improved to accommodate changing technology and requirements. Additional, unforeseen factors may also prove to be of great importance as the service evolves.

This filing deadline would allow ample time for the Commission to act upon replacement system applications and would allow the licensee sufficient opportunity to implement its next generation system promptly upon expiration of its existing system license. This deadline would further serve to give notice to future applicants that an existing licensee will or will not be seeking replacement system authority and thus allow them to prepare their applications accordingly. We would like comment regarding the length and timing of this filing window, as well as its general desirability.

H. Milestones

23. Although we propose that an applicant need only show, as a preliminary matter, that it is financially capable of constructing, launching and operating a two-satellite system, we will require permittees to proceed with the construction and launch of their entire proposed systems in compliance with specified milestones. These milestones will ensure that NVNG MSS systems are being implemented in a timely manner and will allow the maximum number of NVNG MSS systems to be accommodated and operational to the benefit of users. We propose, as a general matter, that each permittee begin construction of the first two satellites of its system within one year of grant of the construction permit, and begin construction of the remaining satellites within three years of grant. Construction of the first two satellites must be completed within four years of grant, and the entire proposed system must be launched and operational within six years of grant. Since system size and/or complexity may differ substantially among applicants, however, we do not propose to codify these exact milestone limits.[40] Instead, milestones will be included in the authorization of each individual NVNG MSS system.[41] Permittees must notify the Commission as these milestones are met. Failure to fulfill these conditions will render the system's authorization null and void and another system, if proposed, may become eligible in its place. We request comment on the proposed general milestone deadlines set forth above.

I. Transceiver Application Requirements

24. Rather than requiring individual NVNG MSS transceivers to be licensed, the Committee proposes that a flexible blanket licensing approach be adopted. Under such an approach, either the space station system licensee, or a service vendor, would hold the authorization and responsibility for a specified number of technically identical units. In light of the large costs and burdens involved in issuing individual licenses for potentially thousands of units, we believe that blanket licensing is an efficient and effective method of authorization.[42] The license term for a blanket authorization will be ten years from the date of grant, and requests for authority to include additional transceivers in the authorization will be treated as minor modifications thereto. We request comment on this blanket licensing proposal.

25. In implementing a blanket licensing procedure, we recognize that our goal of minimum regulatory constraint on the industry must be balanced with our obligation to assure efficient, interference-free communication service.[43] To this end, we propose to codify in proposed Section 25.135 a requirement that an end user must obtain the authorization of the space station operator, either directly or through an authorized vendor, before the user may transmit to that system.[44] Once an end user has obtained authority to transmit to and access a particular system, we propose that the transceiver operations of that authorized user be deemed to fall within the blanket earth station license held by that space station operator or vendor. *See* proposed Section 25.135(d). We believe that this approach will facilitate international roaming by users[45] while still protecting domestic interests in an interference-free electromagnetic environment. We request comment on the technical ramifications and legal sufficiency of allowing roaming users periodically to fall within the umbrella of the blanket domestic earth station license.

26. With respect to awarding earth station licenses, the Committee suggests that an NVNG MSS applicant for a mobile unit or gateway earth station authorization demonstrate in its application that transceiver operations will not cause unacceptable interference into other authorized users of the spectrum. This demonstration will be based on existing information that is publicly available at the Commission at the time of filing. We agree that the NVNG MSS applicant should be required to demonstrate that operation of its transceivers or fixed stations will not interfere with other authorized users. We also propose to vest the responsibility for resolving any interference incidents with the earth station licensee.

27. As a final matter, the frequency band from 108 to 137 MHz, used for civil and military aeronautical safety communications and navigation, is adjacent to the 137 to 138 MHz band to be used by the NVNG mobile-satellite service as a downlink band. Depending upon the specific design, the receiver portion of the portable transceiver may emit unintentional radiation in the 108 to 137 MHz band. Because of this interference potential, the Committee suggests, and we propose, a labeling rule to ensure that the hand-held transceivers, or devices that contain transceivers, are not to be operated on board civil aircraft.[46] *See* proposed Section 25.135(b).

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[40] For example, a licensee of a two-satellite system should be more quickly able to construct and launch its system than a licensee proposing twenty space stations.

[41] Similar milestones are used in the domestic fixed-satellite and direct broadcast satellite industries. *See, e.g.*, Norris Satellite Communications, Inc., 7 FCC Rcd 4289 (1992).

[42] *See, e.g.*, Policies and Procedures for the Licensing of Space and Earth Stations in the Radiodetermination Satellite Service, 104 FCC 2d 650 (May 8, 1986), para. 29.

[43] *See* 47 U.S.C. §§ 151, 302.

[44] We anticipate that any transceiver designed to operate with a U.S.-licensed system from a country licensing the use of that same system may be brought into the U.S. by a user to operate with the U.S.-licensed system.

[45] We would hope that as other countries license non-geostationary satellite systems, they would permit roaming by users having technically compatible transceivers designed to operate with systems licensed in the U.S.

[46] Section 15.101(a) of the Commission's rules also applies to the receivers, associated with any of the NVNG MSS transceivers.

J. Domestic Coordination

28. The Committee considered whether a rule requiring coordination between new applicants for NVNG MSS systems and permittees, licensees, and earlier applicants for NVNG MSS systems should be adopted as a means to maximize future entry. It concluded that coordination should be encouraged, but, at the same time, it was concerned that requiring coordination too early in the process would be unduly burdensome and wasteful. Therefore, the Committee recommends that we require coordination only after we determine that the process will be useful.

29. We agree that it would be impractical and unduly burdensome to require existing authorized users to coordinate their systems with each new NVNG MSS applicant. However, we also concur that the coordination process should work to accommodate new entrants to the extent possible. As in the domestic fixed-satellite service, we propose to require all applicants to provide technical information sufficient to demonstrate compatibility with existing authorized users.[47] Potential coordination conflicts can thus be identified in the application process. If, upon review, the Commission believes that it is feasible for the parties to coordinate successfully and a license is granted, we expect the parties to coordinate their systems in good faith.[48]

30. We generally do not require the results of domestic coordinations to be filed with the Commission, preferring instead to leave coordination matters to the affected entities.[49] We propose to extend this policy the NVNG MSS. Nonetheless, we would like comment on the general desirability of imposing a reporting requirement in this instance.

31. The Committee also discussed coordination methodologies between NVNG MSS providers and Federal government agencies sharing the same frequency bands, and concluded that the existing National Telecommunications and Information Administration/Interdepartment Radio Advisory Committee structure, in which the Commission participates with a liaison representative, is best suited for this purpose. The coordination of space and earth stations with the Federal government must be completed before construction authorization. *See* proposed Section 25.142(b)(2).

K. International Obligations

32. Non-geostationary mobile satellite services are inherently international systems. VITA proposes to offer international services immediately upon being authorized and we presume that the other NVNG MSS applicants will offer international services later. Due to their international character, these systems will be subject to a number of international obligations. As in all other satellite services, each applicant, licensee and permittee would be required by Section 25.111(b) of the Commission's Rules to provide the Commission with all information required for Advance Publication, coordination and notification of frequency assignments pursuant to the international Radio Regulations and consultations required by Article XIV of the INTELSAT Agreement and Article 8 of the INMARSAT Convention. Additionally, Resolution 46 (WARC 1 92) requires non-geostationary satellite systems to coordinate their systems and notify their frequency assignments. The Commission, as the registering administration for the U.S., will work with the NVNG MSS systems in fulfilling their obligations. The Commission will also continue to participate in ITU fora on sharing techniques and other technical issues relating to these systems. The Commission will require licensed NVNG MSS systems to meet both their international obligations and the national requirements imposed on them by other licensing administrations.

L. Regulatory Treatment

33. Finally, we propose to permit domestic NVNG MSS applicants to elect to provide services on either a common carrier or non-common carrier basis. To the extent that licensees choose to provide services on a common carriage basis, we propose that they be classified as non-dominant carriers, and therefore subject to streamlined tariff filing and facilities authorization procedures under Parts 61 and 63 of the Commission's Rules.[50] Should the licensees choose to provide services on a common carrier basis, the foreign-ownership limitation in Section 310(b) of the Communications Act would apply.

34. The NVNG MSS applicants propose to provide position determination and two-way data messaging services. With regard to the position determination services, we believe that these activities are not inherently common carrier services because the licensee essentially exercises control over the content of communications channels in the rendition of such services.[51] Nor do we believe that the provision of data messaging services requires us to impose common carrier regulations upon the NVNG mobile-satellite service as a whole. In *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 642 (D.C. Cir.) *cert. denied*, 425 U.S. 999 (1976) (*NARUC I*), the court identified two criteria as determinative of whether a service may be provided on a non-common carrier basis: (1) whether there is or should be any legal compulsion to

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[47] *See* para. 14, *supra*.

[48] *See* proposed Section 25.142(b)(3), which reserves the Commission's right to require coordination at an earlier time, if circumstances dictate. We will, of course, be hesitant to require pre-licensing coordination if such an action would appear to prejudge an application licensing decision.

[49] *See, e.g.*, Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 5 FCC Rcd 179 (1990) (Commission will not become involved unless the parties are unable to reach an agreement. If a coordination agreement between private sector parties cannot be reached after exhaustive good faith effort, the parties may then request Commission intervention.) *See also* Orion Satellite Corp., 5 FCC Rcd 4937, 4938 (1990) (Commission declines to delay authorization of new satellite pending resolution of interference concerns raised by another U.S.-licensed system or to intervene; leaves it to the parties "to resolve potential interference problems through informal coordination prior to seeking Commission involvement").

[50] STARSYS and VITA propose to provide service on a non-common carriage basis. ORBCOMM proposes to operate as a common carrier.

[51] *See, e.g.*, Radiodetermination Satellite Service, 49 Fed. Reg. 36512 (September 18, 1984), citing Industrial Radio Service, 5 FCC 2d 197, 202 (radiolocation is not a common carrier service within the meaning of Title II of the Communications Act because "the specific intelligence transmitted is and must be the sole responsibility and prerogative of the licensee and not the subscriber.").

serve the public indifferently, and (2) if not, whether there are reasons implicit in the nature of the service to expect an indifferent holding out to the eligible user public.[52]

35. Here, applying the tenets of *NARUC I*, we do not anticipate that there will be a public interest reason to impose a legal compulsion upon all NVNG MSS operators to serve the public indifferently. We note in this regard that these services may be valuable, among other things, for the protection of life and safety. We ask parties to comment on whether it would be necessary to impose any common carrier obligations in order to assure the availability of these kinds of service to the public. We note that multiple entrants can be accommodated and, indeed, one of the two commercial NVNG MSS applicants has indicated its intent to operate as a common carrier. Further, competitive radiolocation and message services already exist,[53] a competitive geostationary mobile-satellite service system has been authorized[54] and is being built, and a rulemaking is underway to license additional mobile-satellite systems in other frequency bands.[55] Accordingly, it appears that sufficient competitive capacity is or will be available to assure the public of ample access to these types of services. We request comment, however, on this assessment of comparable capacity.

36. It further does not appear, applying the second phase of the *NARUC I* test, that the service proposed by the applicants need necessarily be offered as an indifferent holding out to the public. As proposed in the applications of both STARSYS and ORBCOMM, NVNG mobile-satellite services may be tailored to provide a wide variety of specialized low-cost position determination and data messaging services. Location devices may be benignly embedded in new automobiles as a theft deterrent; remote area adventurers may use a unit on a one-time basis for emergency backup; or a single shipping concern may use hundreds of devices to track, and correspond regarding, valuable cargo. As these examples indicate, the proposed NVNG mobile-satellite service may be styled to accommodate the highly individualized methods of operation and demands of potential users. Again, we request comment on this assessment. As noted above, if carriers choose to offer service indiscriminately to the public and thus operate as common carriers, we propose to subject them to streamlined regulatory treatment.

IV. CONCLUSION

37. In this *Notice*, we propose regulations that will allow the licensing and operation of competitive non-voice, non-geostationary mobile-satellite service systems operating in the frequency bands below 1 GHz.[56] Such rules are in the public interest because they will promote the earliest availability of a new satellite service. We request comment on the issues and proposals addressed in this *Notice* and encourage all interested parties to participate in the resolution of this matter.

V. PROCEDURAL MATTERS

A. Ex Parte Rules - Non-Restricted Proceeding

38. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed in accordance with Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

B. Regulatory Flexibility

39. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

C. Comment Dates

40. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **April 26, 1993,** and reply comments on or before **May 26, 1993.** To file formally in this proceeding, you must file an original and four copies of all comments, reply comments and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send your comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

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[52] Regarding "legal compulsion," the *NARUC I* court found that Specialized Mobile Radio Systems (SMRS) were not compelled by the Commission to serve any particular applicant and had unlimited discretion in determining whom, and on what terms, to serve. The court also determined that there was "little reason to expect any sort of holding out to the public" if the service involved the establishment of medium to long term contractual relations with a high level of stability among those employing the service and if the operator expected to provide highly individualized services to clients.

[53] *E.g.*, Qualcomm's satellite-based radiolocation and two-way data messaging service. Qualcomm, Inc., 4 FCC Rcd 1543 (1989).

[54] Memorandum Opinion, Order and Authorization, 4 FCC Rcd 6041 (1989) (*AMSC Authorization Order);* Final Decision on Remand, 7 FCC Rcd 266 (1992).

[55] *See generally* CC Docket 92-166. Five of the applicants in this proceeding have proposed non-geostationary systems.

[56] Upon adoption of final rules, we propose to allow applicants 90 days during which to amend their applications to conform to the new regulations and to pay appropriate construction and launch fees. *See* Telecommunications Authorization Act of 1992, H.R. 6180, January 3, 1992, at Title II, Sec. 209.

VI. ORDERING CLAUSE

41. Accordingly, pursuant to authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and 303(r), we hereby give notice of our intent to adopt the regulations and licensing policies set forth in Appendix A.

42. IT IS ORDERED that the Secretary shall send a copy of this Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration in accordance with 5 U.S.C. § 601 *et seq.* (1981).

43. For further information regarding this Notice of Proposed Rulemaking, contact Kristi L. Kendall, Common Carrier Bureau, Domestic Facilities Division, (202) 634-7058.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Title 47 of the Code of Federal Regulations, Parts 2 and 25, are amended as follows:

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Sec. 4, 302, 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.

2. A new paragraph is added, in alphabetical order, to Sections 2.1 and 25.201 to read as follows:

Non-Voice, Non-Geostationary Mobile-Satellite Service. A mobile-satellite service reserved for use by non-geostationary satellites in the provision of non-voice communications which may include satellite links between land earth stations at fixed locations.

3. The Table of Contents for Part 25 is revised to read as follows:

PART 25 - SATELLITE COMMUNICATIONS

Subpart A - General

Sec.

25.101 Basis and scope.
25.102 Station authorization required.
25.103 Definitions.
25.104 Preemption of local zoning of earth stations.
25.105 - 25.108 [Reserved]
25.109 Cross-reference.

Subpart B - Applications and Licenses

25.110 Filing of applications, fees, and number of copies.
25.111 Additional information.
25.112 Defective applications.
25.113 Construction permits.
25.114 Applications for space station authorizations.
25.115 Applications for earth station authorizations.
25.116 Amendments to applications.
25.117 Modification of station license.
25.118 Assignment or transfer of control of station authorization.
25.119 Application for special temporary authorization.
25.120 License term and renewals.

EARTH STATIONS

25.130 Filing requirements for transmitting earth stations.
25.131 Filing requirements for receive-only earth stations.
25.132 [Reserved]
25.133 Period of construction; certification of commencement of operation.
25.134 Licensing provisions of very small aperture terminal (VSAT) networks.
25.135 Licensing provisions for earth station networks in the non-voice, non-geostationary mobile-satellite service.

SPACE STATIONS

25.140 Qualifications of domestic fixed-satellite space station licensees.
25.141 Licensing provisions for the radiodetermination satellite service
25.142 Licensing provisions for the non-voice, non-geostationary mobile-satellite service

PROCESSING OF APPLICATIONS

25.150 Receipt of Applications.
25.151 Public notice period.
25.152 Dismissal and return of applications.
25.153 Repetitious applications.
25.154 Opposition to applications and other pleadings.
25.155 Mutually exclusive applications.
25.156 Consideration of applications.

FORFEITURE, TERMINATION, AND REINSTATEMENT OF STATION AUTHORIZATION

25.160 Administrative sanctions.
25.161 Automatic termination of station authorization.
25.162 Cause for termination of interference protection.
25.163 Reinstatement.

Subpart C - Technical Standards

25.201	Definitions.
25.202	Frequencies, frequency tolerance and emission limitations.
25.203	Choice of sites and frequencies.
25.204	Power limits.
25.205	Minimum angle of antenna elevation.
25.206	Station identification.
25.207	Cessation of emissions.
25.208	Power flux density limits.
25.209	Antenna performance standards.
25.251	Special requirements for coordination.
25.252	Maximum permissible interference power.
25.253	Determination of coordination distance for near great circle propagation mechanisms.
25.254	Computation of coordination distance contours for propagation modes associated with precipitation scatter.
25.255	Guidelines for performing interference analyses for near great circle propagation mechanisms.
25.256	Guidelines for performing interference analyses for precipitation scatter modes.
	[Reserved]
25.300	Developmental operation.

Subpart D -- [Reserved]

Subpart E - Developmental Operations

25.308	Automatic Transmitter Identification System (ATIS)

Subparts F - G -- [Reserved]

Subpart H - Authorization To Own Stock in the Communications Satellite Corporation

25.501	Scope of this subpart.
25.502	Definitions.
25.503 - 25.504	[Reserved]
25.505	Persons requiring authorization.
25.206 - 25.514	[Reserved]
25.515	Method of securing authorization.
25.516 - 25.519	[Reserved]
25.520	Contents of application.
25.521	Who may sign applications.
25.522	Full disclosures.
25.523	Form of application, number of copies, fees, etc.
25.524	[Reserved]
25.525	Action upon applications.
25.526	Amendments.
25.527	Defective applications.
25.528 - 25.529	[Reserved]
25.530	Scope of authorization.
25.531	Revocation of authorization.

4. The authority citation for Part 25 continues to read as follows:

AUTHORITY: Sections 101 - 404, 76 Stat. 419 - 427; 47 U.S.C. 701 - 744, Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interprets or applies sec. 303, 48 Stat. 1082, as amended; 47 U.S.C. 303.

5. Section 25.114 is amended by revising paragraph (c)(18), and adding a new paragraph (c)(27), to read as follows:

§ 25.114. Applications for space station authorizations.

****

(c) * * * *

(18) Detailed information demonstrating the financial qualifications of the applicant to construct and launch the proposed satellites. Applications for domestic and NVNG MSS satellite systems shall provide the financial information required by § 25.140(b)-(e) or § 25.142(b)(4). Applications for international satellite systems shall provide the information required by Establishing of Satellite Systems Providing International Communications, 50 FR 42266 (October 18, 1985), 101 FCC 2d 1046 (1985).

* * * *

(27) Applications to license multiple space station systems in the non-voice, non-geostationary mobile-satellite service under blanket operating authority shall also provide all information specified in § 25.142.

6. Section 25.115 is amended by adding new a paragraph (d) to read as follows:

§ 25.115 Applications for earth station authorizations.

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(d) User transceivers in the non-voice, non-geostationary mobile-satellite service need not be individually licensed. Service vendors may file blanket applications for transceiver units using FCC Form 493 and specifying the number of units to be covered by the blanket license. FCC Form 430 should be submitted if not already on file in conjunction with other facilities licensed under this subpart. Each application for a blanket license under this section shall include the information described in § 25.135.

7. Section 25.120 is amended by revising paragraphs (d) and (e) to read as follows:

§ 25.120 License term and renewals.

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(d) Space stations.

(1) For space stations in the fixed-satellite services, the license term will begin at 3 a.m. EST on the date the licensee certifies to the Commission that the sat-

ellite has been successfully placed into orbit and that the operations of the satellite fully conform to the terms and conditions of the space station radio authorization.

(2) For space station systems in the non-voice, non-geostationary mobile-satellite service, the license term will begin at 3 a.m. EST on the date that the licensee certifies to the Commission that its initial space station has been successfully place into orbit and that the operations of that satellite fully conform to the terms and conditions of the space station system authorization. All space stations launched and brought into service during the ten-year license term shall operate pursuant to the system authorization, and the operating authority for all space stations will terminate upon the expiration of the system license.

(e) Renewal of licenses. Applications for renewals of earth station license must be submitted on FCC Form 405 (Application for Renewal of Radio Station License in Specified Services) no earlier than 90 days and no later than 30 days, before the expiration date of the license. Blanket applications for space station system replacement authorization in the non-voice, non-geostationary mobile-satellite service shall be filed no earlier than 90 days and no later than 30 days, prior to the end of the seventh year of the existing system license.

8. Section 25.130 is amended by revising paragraph (b) to read as follows:

§ 25.130 Filing requirements for transmitting earth stations.

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(b) A frequency coordination analysis in accordance with § 25.203 shall be provided for earth stations transmitting in the frequency bands shared with equal rights between terrestrial and space services, except that transceiver units associated with the non-voice, non-geostationary mobile-satellite service shall instead provide the information required by § 25.135. * * * *

9. Section 25.133 is amended by revising paragraph (b) to read as follows:

§ 25.133 Period of construction; certification of commencement of operation.

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(b) Each license for a transmitting earth station included in this part shall also specify as a condition therein that upon the completion of construction, each licensee must file with the Commission a certification containing the following information: The name of the licensee, file number of the application, call sign of the antenna, date of the license, a certification that the facility as authorized has been completed, that each antenna facility has been tested and is within 2 dB of the pattern specified in § 25.209, and that the station is operational including the date of commencement of service, and will remain operational during the license period unless the license is submitted for cancellation. For stations authorized under § 25.115(c) and (d) of this part (Large Networks of Small Antennas operating in the 12/14 GHz bands; User transceivers in the non-voice, non-geostationary mobile-satellite service), a certificate must be filed when the network is put into operation.

10. A new section 25.135 is added to read as follows:

§ 25.135 Licensing provisions for earth station networks in the non-voice, non-geostationary mobile-satellite service.

(a) Each applicant for a blanket earth station license in the non-voice, non-geostationary mobile-satellite service shall demonstrate that transceiver operations will not cause unacceptable interference to other authorized users of the spectrum, based on existing system information publicly available at the Commission at the time of filing, and will comply with operational conditions placed upon the systems with which they are to operate in accordance with Section 25.142(b). This demonstration shall include a showing as to all the technical parameters, including duty cycle and power limits, under which the individual user transceivers will operate.

(b) Transceiver units associated with the non-voice, non-geostationary mobile-satellite service may not be operated on civil aircraft. All portable or hand-held transceiver units (including transceiver units installed in other devices that are themselves portable or hand-held) having a receiver operating in the 137-138 MHz band shall bear the following statement in a conspicuous location on the device: "This device may not be operated while on board a civil aircraft. It must be turned off at all times while on board such an aircraft." This subsection shall not apply to transceiver; units that are incapable of radiating in the 108-137 MHz frequency bands.

(c) Transceiver units in this service are authorized to communicate with and through U.S. authorized space stations only. No person shall transmit to a space station unless the specific transmission is first authorized by the space station licensee or by a service vendor authorized by that licensee.

(d) Any transceiver unit associated with this service will be deemed, when communicating with a particular non-voice, non-geostationary mobile-satellite service system pursuant to paragraph (c) of this section, to be temporarily associated with and licensed to the system operator or sevice vendor holding the blanket earth station license awarded pursuant to Section 25.115(d). The domestic earth station licensee shall, for such temporary period, assume the same licensee responsibility for such transceiver as if such transceiver were regularly licensed to it.

11. A new Section 25.142 is added to read as follows:

§ 25.142 Licensing provisions for the non-voice, non-geostationary mobile-satellite service.

(a) Space station application requirements.

(1) Each application for a space station system authorization in the non-voice, non-geostationary mobile-satellite service shall describe in detail the proposed non-voice, non-geostationary mobile-satellite system, setting forth all pertinent technical and operational aspects of the system, and the technical, legal, and financial qualifications of the applicant. In particular, each application shall include the information specified in Section 25.114, except that in lieu of the information concerning orbital locations requested in Section 25.114(c)(6), the applicant shall specify the number of space stations and applicable

information relating to the altitude(s), argument(s) of perigee, service arc(s), right ascension of ascending node(s), eccentricity, and inclination of the space stations (all referenced to the same time) that will comprise its system. Applicants must also file information demonstrating compliance with all requirements of this section, and showing, based on existing system information publicly available at the Commission at the time of filing, that they will not cause unacceptable interference to any non-voice, non-geostationary mobile-satellite service system authorized to construct or operate.

(2) Applicants for a non-voice, non-geostationary mobile-satellite must identify the power flux density produced at the Earth's surface by each space station of their system in the frequency bands 137-138 MHz and 400.15-401 MHz, to allow determination of whether coordination with terrestrial services is required under footnotes 599A and 647X of Section 2.106 of the Commission's Rules. In addition, applicants must identify the measures they would employ to protect the radio astronomy service in the 150.05-153 MHz and 406.1-410 MHz bands from harmful interference from unwanted emissions.

(3) Emission limitations.

(i) Applicants in the non-voice, non-geostationary mobile-satellite service shall show that their space stations will not exceed the emission limitations of paragraphs (f)(1), (2), and (3) of Section 25.202, as calculated for a fixed point on the Earth's surface in the plane of the space station's orbit, considering the worst-case frequency tolerance of all frequency determining components, and maximum positive and negative Doppler shift of both the uplink and downlink signals, taking into account the system design.

(ii) Applicants in the non-voice, non-geostationary mobile-satellite service shall show that no signal received by their satellites from sources outside of their system shall cause an output signal to be generated that is not in conformance with paragraph (f) of Section 25.202 and paragraph (a)(3)(i) of this section.

(4) Financial qualifications. Each applicant for space station system authorization in the non-voice, non-geostationary mobile-satellite service must demonstrate, on the basis of the documentation contained in its application, that it is financially qualified to proceed expeditiously with the construction, launch and operation for one year of the first two space stations of its proposed system immediately upon grant of the requested authorization. Failure to make such a showing will result in the dismissal of the application. This showing shall include all information described in § 25.140(c), (d) and (e).

(5) Replacement of space stations within the system license term. The licensee need not file separate applications to construct, launch and operate technically identical replacement satellites within the term of the system authorization. However, the licensee shall certify to the Commission, at least thirty days prior to launch of such replacement(s) that:

(i) the licensee intends to launch a space station that is technically identical to those authorized in its system license, and

(ii) launch of this space station will not cause the licensee to exceed the total number of operating space stations authorized by the Commission.

(b) Operating conditions. In order to ensure compatible operations with authorized users in the frequency bands to be utilized for operations in the non-voice, non-geostationary mobile-satellite service, non-voice, non-geostationary mobile-satellite service systems must operate in accordance with the conditions specified in this section.

(1) Service limitation. Voice services may not be provided.

(2) Coordination requirements with Federal government users.

(i) The frequency bands allocated for use by the non-voice, non-geostationary mobile-satellite service are also authorized for use by agencies of the Federal government. The Federal use of frequencies in the non-voice, non-geostationary mobile-satellite service frequency bands is under the regulatory jurisdiction of the National Telecommunications and Information Administration (NTIA).

(ii) The Commission will use its existing procedures for liaison with NTIA to reach agreement with respect to achieving compatible operations between Federal government users under the jurisdiction of NTIA and non-voice, non-geostationary mobile-satellite service systems (including user transceivers subject to blanket licensing under Section 25.115(d)) through the frequency assignment and coordination practices established by NTIA and the Interdepartment Radio Advisory Committee (IRAC). In order to facilitate such frequency assignment and coordination, applicants shall provide the Commission with sufficient information to evaluate electromagnetic compatibility with the Federal government use of the spectrum, and any additional information requested by the Commission. As part of the coordination process, applicants shall show that they will not cause unacceptable interference to authorized Federal government users, based upon existing system information provided by the Government. The frequency assignment and coordination of the satellite system shall be completed prior to grant of construction authorization.

(iii) The Commission shall also coordinate with NTIA/IRAC with regard to the frequencies to be shared by those earth

stations of non-voice, non-geostationary mobile-satellite service systems that are not subject to blanket licensing under Section 25.115(d), and authorized Federal government stations in the fixed and mobile services, through the exchange of appropriate systems information.

(3) Coordination among non-voice, non-geostationary mobile-satellite service systems. Applicants for authority to establish non-voice, non-geostationary mobile-satellite service systems are encouraged to coordinate their proposed frequency usage with existing permittees and licensees in the non-voice, non-geostationary mobile-satellite service whose facilities could be affected by the new proposal in terms of frequency interference or restricted system capacity. All affected applicants, permittees, and licensees shall, at the direction of the Commission, cooperate fully and make every reasonable effort to resolve technical problems and conflicts that may inhibit effective and efficient use of the radio spectrum; however, the permittee or licensee being coordinated with is not obligated to suggest changes or re-engineer an applicant's proposal in cases involving conflicts.

(4) Safety and distress communications. Stations operating in the non-voice, non-geostationary mobile-satellite service may also be subject to the provisions of Sections 321(b) and 359 of the Communications Act of 1934, as amended to the extent applicable. Licensees are advised that these provisions give priority to radio communications or signals relating to ships in distress and prohibit a charge for the transmission of maritime distress calls and related traffic.

(c) Reporting requirements. All operators of non-voice, non-geostationary mobile-satellite service systems shall file a semi-annual report with the Common Carrier Bureau and the Commission's Laurel, Maryland field office containing the following information:

(1) Status of satellite construction and anticipated launch dates, including any major problems or delays encountered;

(2) A listing of any non-scheduled space station outages for more than thirty minutes and the cause(s) of such outages;

(3) A detailed description of the utilization made of the in-orbit satellite system. That description should identify the percentage of time that the system is actually used for domestic transmission, the amount of capacity (if any) sold but not in service, and the amount of unused system capacity; and

(4) Identification of any space stations not available for service or otherwise not performing to specifications, the cause(s) of these difficulties, and the date any space station was taken out of service or the malfunction identified.

12. Section 25.151 is amended by revising paragraph (c)(5) to read as follows:

§ 25.151 Public notice period.

****

(c) * * * *

(5) For consent to an assignment or transfer of control of a space station authorization or a transmitting earth station authorization, where the assignment or transfer does not involve a substantial change in ownership or control; or

13. Section 25.202 is amended by adding a new paragraph (a)(3), and by revising paragraph (f)(4), to read as follows:

§ 25.202. Frequencies, frequency tolerance and emission limitations.

****

(a) * * * *

(3) The following frequencies are available for use by the non-voice, non-geostationary mobile-satellite service:

137-138 MHz:	space-to-Earth
148-149.9 MHz:	Earth-to-space
149.9-150.05 MHz:	Earth-to-space
399.9-400.05 MHz:	Earth-to-space
400.15-401 MHz:	space-to-Earth

Until January 1, 1997, the allocations in the 149.9-150.05 MHz and 399.9-400.05 MHz bands may be used on a secondary basis only. Since the 399.9-400.05 MHz band is not allocated internationally to the mobile-satellite service, all operations outside the United States will be on a non-interference basis only. * * * *

(f) * * * *

(4) In any event, when an emission outside of the authorized bandwidth causes harmful interference, the Commission may, at its discretion, require greater attenuation than specified in paragraphs (f)(1), (2) and (3) of this section.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

This rulemaking is initiated to obtain comment on the proposed licensing and regulation of a new mobile-satellite service.

Objectives

The Commission seeks to evaluate the whether the proposed licensing and regulatory proposals will result in the most reasonable and effective regulation of the NVNG mobile-satellite service.

Legal Basis

The proposed action is authorized under Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 C.F.R. §§ 154(i) and 303(r).

Reporting, Recordkeeping and Other Compliance Requirements

Licensees in the NVNG mobile-satellite service will be required to notify the Commission regarding the construction, launch and operation of their satellite systems.

Federal Rules That Overlap, Duplicate or Conflict With These Requirements

None.

Description, Potential Impact and Number of Small Entities Involved

Any policies or regulations adopted in this proceeding could affect the marketing opportunities of potential new service providers or equipment manufacturers, who may be small entities, in the NVNG mobile-satellite service. As this is a new service, the number of such small business is unknown.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent With the Stated Objectives

This Notice solicits comments on any suggested alternatives.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-100

In re Applications of

MADALINA BROADCASTING, INC.	File No. BPH-890921MB
PODER BROADCASTING, INC.	File No. BPH-890921ML
PRAIRIE BROADCASTING, INC.	File No. BPH-890921MN
JONATHAN and MARY LYN WOLFERT, GENERAL PARTNERSHIP	File No. BPH-890921MR
HISPANIC COALITION, INC.	File No. BPH-890921MS
O'DAY BROADCASTING, INC.	File No. BPH-890921MZ
JOHN W. BARGER	File No. BPH-890921NC
MELANIE BRUTON	File No. BPH-890921NG

For Construction Permit for a
New FM Station on Channel 227C2
in Haltom City, Texas

Appearances

Matthew L. Leibowitz, and *Joseph A. Belisle*, on behalf of Madalina Broadcasting, Inc.; *Harry C. Martin*, *Cheryl A. Kenny*, and *Andrew S. Kersting*, on behalf of Poder Broadcasting, Inc.; *Kathryn R. Schmeltzer*, *John K. Kane, III*, and *Matthew P. Zinn*, on behalf of Prairie Broadcasting, Inc.; *Robert S. Stone*, on behalf of Jonathan and Mary Lyn Wolfert, A General Partnership; *James A. Gammon*, and *A. Wray Fitch, III*, on behalf of Hispanic Coalition, Inc.; *Stephen Diaz Gavin* and *J. Jeffrey Craven*, on behalf of O'Day Broadcasting, Ltd.; *Gene A. Bechtel*, on behalf of John W. Barger; *Lawrence J. Bernard, Jr.*, on behalf of Melanie Bruton; and *Robert A. Zauner*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: August 13, 1993; Released: September 3, 1993

PRELIMINARY STATEMENT

1. This case involves the following eight applicants for a new FM Broadcast Station to operate on Channel 227C2 at Haltom City, Texas: Madalina Broadcasting, Inc. (Madalina), Poder Broadcasting, Inc. (Poder), Prairie Broadcasting, Inc. (Prairie), Jonathan and Mary Lyn Wolfert, A General Partnership (Wolfert), Hispanic Coalition, Inc. (Hispanic), O'Day Broadcasting, Ltd. (O'Day), John W. Barger (Barger) and Melanie Bruton (Bruton).[1]

2. By *Hearing Designation Order*, 6 FCC Rcd 2508 (Mass Med. Bur., 1991) (HDO), the following issues were specified:

> 1. To determine whether there is a reasonable possibility that the tower height from locations proposed by ... Prairie, Barger and Bruton would constitute a hazard to air navigation.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

The HDO also directed that the coverage proposed by each applicant be considered under the standard comparative issue.

3. Summary decision on the air hazard issues was granted by *Memorandum Opinion and Order*, FCC 91M-2024 (June 28, 1991) (in favor of Bruton); *Memorandum Opinion and Order*, FCC 91M-2158 (July 10, 1991) (in favor of Barger); and *Memorandum Opinion and Order*, FCC 91M-2157 (July 11, 1991) (in favor of Prairie).

4. By *Memorandum Opinion and Order*, FCC 91M-2704 (released September 3, 1991) the following issue was added against Madalina:

> To determine whether Madalina Broadcasting, Inc. has a reasonable assurance of obtaining permission from the appropriate local authority for the construction of its proposed tower and antenna at the Madalina Broadcasting, Inc. site specified in its application.

The burden of proceeding on the added issue was placed on Hispanic, while the burden of proof was placed on Madalina.

5. By *Memorandum Opinion and Order*, FCC 91M-3193 (released November 1, 1991) the following issues were added against O'Day:

[1] At the time the Haltom City applications were designated for hearing, there were 25 applicants. As of November 1991, all but nine applicants had been dismissed. *See Order*, FCC 91M-1841 (June 10, 1991); *Order*, 91M-1796 (June 4, 1991); *Order*, 91M-2939 (September 26, 1991). After the November hearing another applicant, Bonnie P. Fox, dismissed her application. *See Order*, FCC 92M-204 (released February 13, 1992).

To determine whether O'Day is financially qualified.

To determine whether O'Day misrepresented facts or lacked candor in certifying its financial qualifications in its Haltom City, Texas application.

The burden of proceeding and the burden of proof were placed on O'Day.

6. By *Memorandum Opinion and Order*, FCC 92M-224 (released February 20, 1992) the following additional issues were added against Madalina:

To determine whether Tichenor Media System, Inc. is a real-party-in-interest in the application of Madalina Broadcasting, Inc.

To determine, in light of the evidence adduced under the issue above, whether Madalina Broadcasting, Inc. is basically qualified to become a Commission licensee.

The burden of proceeding was placed on Poder, while the burden of proof was placed on Madalina.

7. By *Memorandum Opinion and Order*, FCC 92M-302 (released March 10, 1992) the following issue was specified against Bruton:

To determine whether Melanie Bruton is financially qualified to construct and operate her proposed Haltom City station.

The burden of proceeding and proof was placed on Bruton.

8. On June 24, 1992, the Presiding Judge issued a *Memorandum Opinion and Order*, FCC 92M-707, specifying the following issues against Poder:

To determine whether the land specified as Poder Broadcasting, Inc.'s transmitter site is sufficient to effectuate its antenna and transmitter site proposal.

To determine whether Poder Broadcasting, Inc. possesses the requisite reasonable assurance that the site specified in its application will be available for its proposed antenna and transmitter.

To determine on the basis of the evidence adduced on the foregoing issues whether Poder Broadcasting, Inc. possesses the basic qualifications to be a Commission licensee.

The burden of proceeding and proof was placed on Poder.

9. A prehearing conference was held July 8, 1991. *See Order*, FCC 91M-1873 (June 12, 1991). An admissions session was held November 12, 1991. Hearing sessions on the standard comparative issue and the site issue against Madalina were held November 18-25, 1991. Hearing sessions on O'Day's comparative qualifications and the financial and related misrepresentation issues against it were held February 24-25, 1992. Hearing sessions on the real-party issue against Madalina, the financial issue against Bruton, and the amended comparative case of Hispanic were held May 18-20, 1992. A hearing session on the site issues against Poder was held September 15, 1992.

10. The record was closed September 15, 1992. *See Order*, FCC 92M-962 (released September 17, 1992). The Presiding Judge directed that all parties file Proposed Findings and replies on the comparative issue. However, with respect to added issues, only the party who requested the issue and the party against whom the issue was specified were required to file Proposed Findings and replies on such issue. Proposed Findings were filed November 6, 1992; replies were filed November 25, 1992.

11. By *Memorandum Opinion and Order*, FCC 93M-68 (released February 11, 1993) the record was reopened and the following additional issues were added against Bruton:

To determine whether Melanie Bruton made misrepresentations to the Commission and/or lacked candor regarding the financial qualifications issue.

To determine in light of the evidence adduced under the foregoing issue whether Melanie Bruton has the basic qualifications to be a Commission licensee.

The burden of proceeding and proof was placed on Prairie.

12. A hearing session on the misrepresentation issue against Bruton was held April 28, 1993. The record was reclosed on that date. Proposed findings on the added issues were filed June 3, 1993; replies were filed June 11 and June 18, 1993.

FINDINGS OF FACT

Madalina Broadcasting, Inc. (Madalina)

Qualifying Issues
Site Issue

13. Madalina has proposed as its antenna site an undeveloped 8.4-acre parcel of property in North Richland Hills, Texas. The site, zoned C-2 for commercial use, is directly behind an automobile repair shop and a small restaurant. On one side of the property is an 8- or 9-acre vacant lot adjacent to a catfish farm; on the other side is a trucking business. Madalina Ex. 8, p. 1; Hispanic Ex. 8; Tr. 1229. Davis Boulevard, upon which Madalina's site is located, is in a rapidly-growing residential area adjacent to and to the east of, Madalina's site. Tr. 1187-1188, 1199, 1228-1229.

14. The antenna site is covered with brush and trees. It contains gullies, including one that is at least ten feet deep, that would require fill, grading and drainage if the site were used for certain other commercial uses. Madalina Ex. 8, p. 1. The ten-foot gully has continual erosion problems. Tr. 382-284. At deposition, Madalina's president, Ricardo del Castillo, testified he believed the site would be "available until the next century" if Madalina did not buy it because of the gullies and water problems, including drainage, caused by a natural creek, one foot deep or more, running through the site. Tr. 381-384. Thus, he said, anyone trying to use the site for a "normal" commercial or other use would have to spend a large sum of money on drainage and terrain problems. Tr. 383. Other parcels of land abutting the front of the creek have been sold separately. *Id.*

15. The only way to obtain zoning approval for construction of the 405-foot tower Madalina proposes to build on the North Richland Hills site, is to amend the North Richland Hills zoning ordinance. The power to effectuate a change in zoning regulations lies with the North Richland Hills City Council. Madalina Ex. 8, p. 2; Tr. 1169, 1230.[2]

16. Rex L. McEntire, Attorney for the City of North Richland Hills, said in written direct testimony, that changing zoning regulations is a legislative process, whereby the City Council weighs the benefits flowing to the city from a proposed zoning change against any local opposition to the zoning change. Both proponents and opponents of a proposed zoning amendment are given an opportunity to be heard. Madalina Ex. 7, p. 1. At the time of the hearing, Mr. McEntire said that he and the City staff were not aware of local opposition to Madalina's tower proposal, but that such opposition may arise when Madalina actually seeks a zoning amendment for its tower. *Id.*

17. James Brock, Chairman of the North Richland Hills Planning and Zoning Committee (Zoning Committee), testified he was unaware of any amendments to the zoning code having been made for towers in the past. Tr. 1230-1231. A July 11, 1991 letter executed by all seven members of the Zoning Committee at the request of Bob Miller, the Economic Development Director for North Richland Hills, provides:

> To whom it may concern:
>
> Please be advised that the City of North Richland Hills' current zoning does not allow for television and/or radio towers. Therefore, under current regulations we would not consider this type of structure. Moreover, it is highly improbable that current zoning regulations would be changed to allow for future construction of such a tower.

Hispanic Ex. 10; Tr. 1209, 1214.

18. Mr. Brock, who has been on the Zoning Committee for three years and its Chairman for approximately one year, has lived in North Richland Hills for 20 years. Tr. 1206. He and the other Zoning Committee members were appointed to their non-paid positions by the North Richland Hills City Council. Tr. 1207-1208. The Zoning Committee reviews zoning cases, and makes recommendations on zoning matters to the City Council, which has the final decision on such matters. One of the Zoning Committee's duties is to make recommendations as to whether there should be an amendment to a zoning ordinance. Tr. 1209.

19. Mr. Castillo testified that he believes Madalina can offer the City of North Richland Hills an attractive package to induce a favorable zoning determination on Madalina's proposed antenna site. He said Madalina is willing to locate its studio in North Richland Hills and to identify North Richland Hills, along with Haltom City, in the station's identification. He said Madalina also would clean up the proposed antenna site and improve it, and is willing to donate a portion of the site to the City of North Richland Hills for use as a public park. Additionally, he said, Madalina is willing to locate North Richland Hills radio communications facilities on its tower. Madalina Ex. 8, p. 2. (These proposals are hereafter referred to collectively as the "proposed improvements.")

20. Mr. Castillo admitted that the ten-foot gully on Madalina's proposed site might be a hazard to children, and he has not considered any steps to protect children from falling into the gully. Tr. 383-385. He is inclined to donate some portion, perhaps 20-30%, of the land as a park to the City outright so that protecting the children would be the City's problem, not Madalina's. Mr. Castillo also said that Madalina would not "officially drain" the property and would do only non-extensive grading in order to alleviate some of the erosion around the gully area. Tr. 385. Madalina has not yet obtained consent from the City to receive that property as a park, leaving the liability question open. Tr. 386-387.

21. Since none of Madalina's proposed improvements were set forth in Madalina's August, 1991 Opposition to the petition seeking the site issue, they were not presented to the zoning committee when it issued its July 11 letter, or to Mr. LeBaron when he signed his June 25, 1991 letter. Tr. 1185-1186, 1219-1220. Thus, Mr. McEntire concluded that the Zoning Committee's statement had been "given in a vacuum." Madalina Ex. 7, p. 2. He testified that the "proposed improvements" now offered by Madalina could provide jobs in North Richland Hills, and increase the City's tax base, factors which would be weighed favorably in any request for a zoning amendment to permit a radio tower. *Id.* He did not say that North Richland Hills' zoning ordinance will be amended to permit Madalina to construct a 405-foot radio tower, only that Madalina would be given a fair hearing and that "there is no reason to believe in advance that a meritorious request for a zoning amendment to permit a radio tower in North Richland Hills would be denied." *Id.* However, in a letter dated August 2, 1991 to Melinda Smith, Madalina's local zoning counsel, Mr. McEntire warned Madalina that no city council had ever allowed such a structure in the past:

> The fact remains that high towers are not allowed in the City under the present legislation on the books. The legislative history on this matter indicates that no city council has ever passed an ordinance which would allow this structure. The only way you are going to be able to determine whether or not the City Council will change the ordinance is to propose an amendment to the ordinance. The normal time for staffing, preparation, notices and publication is about 90 days. I certainly can't make any prediction on the chance for passage of any proposed ordinance.

Hispanic Ex. 11.

22. Barry LeBaron is the Director of Community Development for the City of North Richland Hills. Tr. 1167. As such, he heads one of the departments within the city that is responsible for planning, zoning, building permits and code enforcement. *Id.* He is the staff support for the Zoning Committee, prepares the zoning reports for the

[2] When it signed the contract for its proposed site, Madalina included a condition that it did not have to purchase the property if it could not obtain zoning approval for the tower. Tr. 398-399; 403.

Zoning Committee and the City Council and, if so directed, performs studies to determine the pros and cons of issues. Tr. 1178. Mr. LeBaron, who has been in planning and zoning since the early 1960s and is a member of the American Institute of Certified Planners, will be advising the City Council if Madalina proposes a change in the zoning ordinance. Tr. 1167, 1200-1201. By letter dated June 25, 1991, based upon his review of the city zoning ordinance on C-2 zoning, Mr. LeBaron wrote the following with regard to Madalina's proposal:

> Please be advised that height restrictions for any structure in the C-2 zone are determined by using the ratio of one foot from the nearest residential district for every one and a half foot of building height. The City of North Richland Hills would only permit a tower as an incidental use to a primary structure. No towers of any significance have been authorized or constructed in the city during the past ten years. We have even discouraged short cellular telephone towers.
>
> A radio tower of over 100 feet in height anywhere in the city is not contemplated under our zoning regulations. The consistent opposition to such a tower has been such that rezoning for such a tower is highly unlikely and unrealistic.
>
> The city's position is so well known that most applicants for tower rezoning quit without actually filing for rezoning.

Hispanic Ex. 8; Tr. 1188.

23. Mr. LeBaron testified that it is more difficult to obtain a change in zoning laws than to obtain a variance in zoning. Tr. 1198. He said that any written proposal for a zoning change would be made to the Planning and Zoning Commission, and that thereafter oppositions could be filed. Tr. 1179-1180. Mr. LeBaron affirmed that high towers are not allowed in the City of North Richland Hills under the present laws and that no Richland Hills City Council has ever passed an ordinance which would allow a 405-foot tower. Tr. 1198.

24. The tallest tower in North Richland Hills is a 70-80 foot tower used for business mobile radio. Tr. 1186, 1189. There has been no application filed for a tower in North Richland Hills since Mr. LeBaron has been with the City, and his staff members, who have been there "for a number of years," cannot recall any such application coming before the City. Tr. 1189. There have been some verbal requests to build 100 to 1220-foot cellular telephone towers in North Richland Hills, but each such proposal has been discouraged, so that the proponents have not filed zoning applications. Mr. LeBaron continues to discourage such proposals. Tr. 1190-1191.

25. Mr. LeBaron testified he would look to the residential district adjacent to Madalina's tower site in assessing what tower height could be placed on the property. The present regulations limit towers, even those "incidental" to a primary structure, to 100 feet, but if the tower is closer to a residential district, even a 100-foot tower might not be permitted. Tr. 1188-1189. Mr. Brock, Chairman of the Zoning Committee, testified that commercial C-2 zones, such as Madalina's site location, are not permitted towers of any height. Tr. 1228.

26. Mr. LeBaron testified that he and other members of the city staff are not aware of what proposal Madalina intends to present to the city, and that Madalina has never discussed, nor attempted to discuss, with him any plans to create a park or otherwise improve the property. Tr. 1170, 1172, 1191, 1194. When asked whether Madalina's proposed improvements would alter his opinion on the chances a rezoning request would be granted, he testified it would no longer be "highly unlikely" such a grant would be forthcoming, but he could not say it is likely such a proposal would succeed. Tr. 1176-1177. He said he would give the same letter on Madalina's tower proposal even if Madalina's studios would be located in Richland Hills. Tr. 1184. In prior zoning matters unrelated to broadcasting, when other factors would increase jobs in the city and enhance the tax base, they would sometimes weigh in favor of zoning changes, but LeBaron could not say whether they would occur more often than not. Tr. 1177-1178. He noted that the City's decision could be affected by the number of jobs which would come into the City, with proposals bringing significant numbers of jobs having more impact. Tr. 1193.

27. Mr. LeBaron said that while the fact Madalina's site is located on a busy thoroughfare could improve the chances for rezoning approval, the fact there is a residential zone adjacent to the site also would affect the city's judgment. Tr. 1186-1187. Additionally, the responsibility and liability the deep gully on Madalina's site would entail could adversely affect the City's judgment as to whether it wanted a park on that property. Tr. 1191-1192. He voiced concern that a park and a 400-foot tower would not be compatible, in part because children might attempt to climb the guy wires or the fence around the tower. Tr. 1192, 1195. (Mr. Castillo does not know whether a guy wire will be anchored on that part of the property proposed to be a park. Tr. 406). Mr. LeBaron said he would warn the Zoning Committee that action would be needed to prevent such activities if a park were established. Mr. LeBaron agreed that a fence or wall could mitigate the danger. Tr. 1195. Mr. LeBaron believes there are now no parks in any commercially-zoned areas in North Richland Hills. Tr. 1197.

28. Zoning Committee Chairman James Brock also did not know of any tower proposal made to the City while he has been on the Zoning Committee, and he has never been faced with a zoning ordinance change. Tr. 1211. He learned two days before the November 1991 hearing that Madalina's attorney had been in touch with City Attorney Rex McEntire to discuss Madalina's proposed improvements. Tr. 1218. When asked to reconsider his July 11, 1991 statement that a zoning change would be "highly improbable," in light of such proposed improvements, Mr. Brock responded that those proposals would make the package "more attractive," but the Zoning Committee would have to weigh the benefits to the City versus public opinion and safety factors in order to give a recommendation. Tr. 1219-1220, 1222.

29. Mr. Brock testified that proposed donations of land for a park in North Richland Hills have been turned down in the past. Each proposal is reviewed on an individual basis, with location being one factor. Tr. 1220. In determining whether to allow the tower, with a proposal that part of the property be a park, the City would consider the nature and physical quality of the property and whether it was suitable for the park. Tr. 1232. Mr. Brock believes there will be opposition to establishing a park adjacent to

Madalina's proposed tower because of a perception it would be unsafe. Tr. 1232-1233. He also expressed concern about the tower being sufficiently far away from homes that there would be no danger from it falling. He foresees concerns from homeowners about having a tower nearby. Tr. 1222.

30. Mr. Brock said that Madalina would receive a fair hearing, and that the proposed improvements would be positive factors the City would evaluate, and which could possibly result in a zoning change. However, he could think of no case where it had done so. Tr. 1223-1224, 1227. Mr. Brock agreed with Mr. McEntire's written hearing testimony that there is no reason to believe in advance that a meritorious request for a zoning amendment to permit a radio tower in North Richland Hills would be denied, but, he noted that "the key word would be 'meritorious request.'" Tr. 1225-1226.

Real Party Issue Against Madalina

31. Madalina is a two-tiered Texas corporation. Its two voting stockholders are Ricardo Alvarez del Castillo and his wife, Madaline Alvarez del Castillo, each holding 50% of the corporation's voting stock. Mr. Castillo is Madalina's president and a director; Mrs. Castillo is its secretary and a director. Madalina Ex. 1, p. 1. None of the non-voting stock in the corporation has been issued. However, Madalina has entered into a financing arrangement with Tichenor Media System, Inc. (TMS) which gives TMS the option of converting its debt into non-voting stock, for up to 80% of Madalina's equity. *Id.*[3]

32. Ricardo Castillo is employed by TMS, a company with ownership interests in at least 13 Spanish language radio stations across the United States. TMS's interests include 100% ownership of five such stations located in the top four Spanish-language markets in Texas. Additionally, a wholly-owned TMS subsidiary, WADO Radio, Inc., owns 100% of SRN Texas, Inc., which is a 50% partner (and managing partner until November 1991) of Spanish Radio Network (SRN), licensee of four stations in New York City and Miami. Madalina Ex. 2; Ex. 37, Attachment A. TMS's President, McHenry "Mac" Tichenor, Jr., is also president of SRN Texas, Inc. and of WADO Radio, Inc., and he "calls the shots" with respect to TMS's interests in SRN. Madalina Ex. 37, Attachment A.

33. TMS has a "financial arrangement" with, and shares in the profits of, a company which operates a Spanish-language network for which TMS also provides some programming. All of TMS's stations carry programming from that network and Mac Tichenor testified at deposition that it is "not out of the question" that he would offer such programming to Madalina, which plans to utilize a Spanish-language format at its proposed station; at hearing he qualified his earlier testimony, stating that decision would be between Madalina and the network. Tr. 373, 2386-2387, 2389. There is no evidence that Madalina and Tichenor have discussed using such network programming.

34. The officers, directors and stockholders of TMS are:

Name	Position	Ownership
McHenry Tichenor	Chairman/Director	2.73% VS
McHenry T. Tichenor, Sr.	Vice Chairman/Director	37.39% VS
McHenry T. Tichenor, Jr.	President/Director	12.52% VS*
Warren W. Tichenor	Vice Pres./Director	12.48% VS
David D. Lykes	Senior V.P./Director	1.51% VS
Jean T. Russell	Advisory Director	12.48% VS
William E. Tichenor	Advisory Director	11.83% VS
Ricardo del Castillo	Vice President/Director	.40% VS
Nathan Safir	Vice President/Director	.40% VS

Madalina Ex. 37, p. 1 and Attachment A.

* Votes total of 20.45% of TMS stock through various trusts and as custodian.

35. Mr. Castillo's position at TMS is Vice President of Operations, working out of TMS's 100 Crescent Court, Dallas office and reporting directly to Mac Tichenor. Madalina Ex. 3, p. 2; Ex. 37, p. 2; Tr. 298-299. He monitors the costs, profits, policies and procedures of TMS's stations and is in charge of budgeting and overseeing station management. Madalina Ex. 3, p. 2; Ex. 37, p. 2. Mr. Castillo, who receives 65-90% of his TMS income based upon his performance, has worked for TMS since 1984, first as manager of Station KLAT, Houston, Texas, then, since August 1988, in his current position. Madalina Ex. 3, p. 2; Ex. 37, p. 5; Tr. 377. He has been a member of the TMS Board of Directors since April or May 1989, and is one of three active members of the TMS Management Service Committee, along with Mac Tichenor and TMS's director and Senior Vice President for Sales and Marketing, David Lykes.[4] Madalina Ex. 2; Ex. 39; Ex. 37, pp. 2-3; Tr. 299, 2313. The Management Service Committee manages the corporation, overseeing the general managers of TMS's radio stations. Madalina Ex. 3, p. 2; Tr. 2312. Castillo is part of the TMS "inner circle" responsible for policy and management decisions for the company. Tr. 300.

36. *Learning of the Allocation.* Marvin Fiedler, full-time director of engineering at TMS, learned of the availability of an FM frequency in the Dallas/Fort Worth area on or about July 12, 1989, through a publication called "The Line Monitor." When that publication incorrectly identified the allotment's location as "Halcom City, Texas", Mr. Fiedler contacted TMS's FCC counsel, Lawrence N. Cohn, of the law firm of Cohn & Marks (the Cohn law firm), who informed him that the correct city of allotment was Haltom City. Madalina Ex. 22, p. 1; Ex. 40, p. 1.

37. After speaking to Mr. Cohn, Mr. Fiedler located Haltom City on a map and, believing the FM allotment was a potential opportunity, on July 14, 1989 wrote a memo concerning the Haltom City allotment to Ricardo Castillo regarding their "conversation this date," with a copy to Mac Tichenor. Poder Ex. 61; Madalina Ex. 22,

[3] Under the financing arrangement, TMS's conversion rights can be exercised when Madalina's application is dismissed or denied or one year after Madalina's station commences broadcast operation. Also, if TMS exercises its conversion rights for Madalina's stock, Madalina's shareholders shall then enter into a shareholder's agreement containing "appropriate" prohibitions on non-voting shareholders' ability to influence station operations. Madalina Ex. 1, p. 12-13, 15.

[4] McHenry Tichenor, Sr., Mac Tichenor's father, is on the Committee but does not regularly attend meetings. Madalina Ex. 37, p. 2.

Attachment A. The same day, July 14, Mr. Cohn wrote Mac Tichenor a letter, with a copy to Mr. Fiedler, also bringing the Haltom City allotment to Mr. Tichenor's attention. Poder Ex. 60, p. 1; Madalina Ex. 22, p. 1 and Attachment B. Mr. Cohn's letter included a copy of the *Report and Order* allotting the Haltom City channel and Mr. Fiedler used the *Report and Order* to prepare a plot of theoretical contours for the station. He then sent that plot to Mac Tichenor, with a copy to Mr. Castillo, through a memo dated July 18, 1989, in which he concluded the station would both serve Dallas and be a good service for Ft. Worth. Madalina Ex. 22, p. 2; Ex. 40, p. 1; Poder Ex. 31. Mr. Castillo telephoned Fiedler on July 20, 1989, asking for another theoretical coverage map for a Haltom City station and Fiedler faxed him a copy. Madalina Ex. 22, p. 2.

38. Mr. Castillo asked Fiedler to study the Haltom City allotment further. Fiedler obtained an engineering study performed by one of his friends from Willoughby & Voss, showing the area in which a Haltom City station could be located. *See* Madalina Ex. 22, p. 2; Poder Ex. 7; Tr. 306-308. Mr. Fiedler sent a copy of the spacing study and his analysis of it to Mr. Castillo by memo dated August 8, 1989. Madalina Ex. 22, Attachment D. In that memo, Fiedler discussed side mounting Madalina's antenna directed toward Dallas, and concluded, "I would also want this modeled on a test range and optimized to achieve the maximum signal toward the east," in order to radiate a maximum signal "toward Dallas." A copy of the memo was sent to Mac Tichenor.[5] *Id.* When asked why Mac Tichenor had been sent a copy of the memo, Mr. Castillo said he thought it could be because Fiedler used to report to Mac Tichenor and still wanted to keep Tichenor informed of what he was doing. Tr. 307-308. Mr. Castillo did not object to a copy being sent to Mac Tichenor. Tr. 308.

39. On August 10, 1989, Ricardo Castillo told Fiedler that he was proceeding with the Haltom City FM project, but Fiedler does not recall whether he told him, at that time, whether it was a personal project or one for TMS. Mr. Fiedler's records show he knew the project was "personal" to Mr. Castillo as of August 25, 1989. Madalina Ex. 22, p. 2.

40. Ricardo Castillo testified that he first learned of the Haltom City allocation in July 1989, through a July 24, 1989 memo which the Cohn law firm had sent to TMS managers and executives. Poder Ex. 30; Madalina Ex. 40, p. 1; Tr. 300-301. Before going ahead with an application, Mr. Castillo discussed it with his wife and then with Mac Tichenor, who gave him permission to file the application as long as it did not interfere with his TMS duties. Madalina Ex. 37, p. 4; Ex. 36, p. 2; Tr. 303-304, 608. He also discussed the plan to apply for the Haltom City station at the meeting of the TMS Management Service Committee, which agreed that Castillo "could go forward without a conflict of interest with respect to TMS." Madalina Ex. 29, p. 1.

41. Mac Tichenor asserted that he also had learned about the Haltom City allocation from a memo circulated by the Cohn law firm listing available channels. Poder Ex. 30; Ex. 59, p. 1; Tr. 578-579, 2314-2315. He said he then informed the Cohn law firm that TMS was not interested because Dallas/Ft. Worth was not a "top ten" Hispanic market. Poder Ex. 59, p. 1.

42. At the November 1991 hearing session, Mac Tichenor did not acknowledge the earlier memos from Fiedler. At his deposition in April 1992, when faced with Fiedler's July 14 and 18, 1989 memos, as well as Lawrence Cohn's July 14, 1989 letter addressed to him, Mac Tichenor conceded that Fiedler had found out about the allocation earlier than the July 24, 1989 date of the Cohn law firm's allocation memo, and when asked "and he called it to your attention, did he not?," responded "yes, apparently." Tr. 2321-2322. At the May 1992 hearing, Mac Tichenor said the first time it "stuck" that there was a Haltom City allotment was when he received a memo from the Cohn law firm with a notation that the allotment was "in his backyard." Tr. 2316-2320. He conceded, however, that other documents might have "crossed his desk" before he received the Cohn law firm memo and that the record clearly shows he was sent memos earlier. Tr. 2315, 2322. Although he said that when he receives a memo from Mr. Fiedler he reads it, he testified that he did not recall receiving or reading Fiedler's July 14 and July 18, 1989 memos. Madalina Ex. 36, p. 1; Tr. 2323.

43. *Madalina's FCC Counsel.* Madalina initially retained the Cohn law firm, to prepare its application. Madalina Ex. 40, p. 2; Ex. 37, p. 17. However, after its application was filed, in October 1989, Madalina had to change counsel because of conflict with the Cohn law firm's representation of Marcos Rodriguez.[6] Madalina then retained its current FCC counsel, Leibowitz & Spencer (L&S), the law firm which represents the TMS-affiliated SRN. Madalina Ex. 35; Tr. 301-303. Through his work at TMS, Castillo previously had had contact with L&S when the firm had called him about legal bills for the SRN stations. Tr. 303. SRN's other 50% partner, Mark Blanc of Radio WADO, Inc., actually retained the firm for SRN; Mr. Castillo does not know if Blanc discussed hiring L&S with Mac Tichenor. Tr. 459. When Madalina chose L&S as its new counsel, Mac Tichenor also already knew L&S attorney Matt Leibowitz, having been in contact with him on FCC matters related to L&S's representation of SRN stations. Tr. 2367.[7]

44. *Madalina's Corporate Counsel.* Another TMS attorney, Bruce Hallett, formerly with the law firm of Gardere & Wynne, now with Crouch & Hallett, was retained by Mr. Castillo to prepare Madalina's corporate papers. Mr. Hallett

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[5] The bottom of the memo contains a "CC:" to "Mac Tichenor, Jr., TMS, Dallas." *See* Poder Ex. 7; Madalina Ex. 22, Attachment D. Mr. Tichenor claims he did not ask for a copy of the memo and does not recall receiving a copy of it. Poder Ex. 59, p. 1; Madalina Ex. 36, p. 1.

[6] The Cohn law firm had represented Station KLAT when it was owned by Mr. Rodriguez and, in his capacity as general manager of KLAT, Mr. Castillo had been in contact with that firm. Mr. Castillo continued to confer with the Cohn law firm after the station was sold to TMS and the Cohn law firm became TMS' counsel. Mr. Castillo asserted that the Cohn law firm was hired because it was the only communications law firm that he had worked with and was satisfied with their work. Madalina Ex. 37, p. 17; Ex. 40, p. 2.

[7] Mr. Castillo testified L&S previously had been counsel to Radio WADO, Inc. Mac Tichenor said he has an "understanding" that L&S had represented Radio WADO, Inc. before that company became involved in SRN. Poder Ex. 59, p. 3; Madalina Ex. 36, p. 8; Ex. 37, p 18. However, the written testimony of L&S partner John Spencer does not include such a claim. Madalina Ex. 35.

has performed corporate legal work for TMS at both firms and, in fact, Castillo met Hallett, a neighbor with whom he now socializes occasionally, professionally through TMS. Madalina Ex. 37, pp. 15-16; Ex. 28, p. 1; Tr. 357. Mr. Hallett incorporated Madalina, prepared its organizational documents, and reviewed real estate documents in connection with Madalina's antenna site. He also counseled the Castillos in connection with a subsequent fee dispute with L&S. Madalina Ex. 28, p. 1; Ex. 37, p. 16. At the time he was retained, Mr. Hallett advised Mr. Castillo that if a conflict arose between TMS and Madalina, he would represent TMS. *Id.*

45. *Madalina's Consulting Engineer.* Marvin Fiedler referred Mr. Castillo to Jules Cohen & Associates, P.C. (Jules Cohen) to be Madalina's consulting engineers. Madalina Ex. 22, p. 3; Tr. 305, 308. Indeed, Fiedler took part in the August 10, 1989 telephone conversation with Mr. Castillo and Jules Cohen vice president William C. King, Jr., during which Jules Cohen was retained. *See* Madalina Ex. 23, p. 1; Poder Ex. 8; Tr. 309-310. Fiedler's recommendation of Jules Cohen came about after, at Mr. Castillo's request, he had called Roy Russo, of the Cohn law firm, to obtain recommendations for Washington engineers. Mr. Russo called Mr. King to confirm that the Jules Cohen firm would be available to work on the Haltom City FM project. Madalina Ex. 22, p. 3; Ex. 23, p. 2. Russo then included Jules Cohen in the list of recommended engineers he provided to Fiedler, and Fiedler chose Jules Cohen to recommend to Castillo. Madalina Ex. 22, p. 3.

46. After being retained by Mr. Castillo, Mr. King completed part of a project write-up form, testifying he understood that the client was Ricardo Castillo, and that TMS was not discussed. The name "Tichenor Media Systems, Inc." and TMS's headquarters' address was written on the project write-up, apparently by Anne Mazor, who was then a Jules Cohen bookkeeper and then crossed out. Mr. King said he did not know why the TMS entry was made and had not seen it until April or May 1992. The project write-up also lists as a contact, "Marvin Fiedler, Director of Engineering, Radio Station KCOR, 1115 West Martin Street, San Antonio, Texas 78205." Mr. King identified the handwriting listing Fiedler as that of another Jules Cohen principal, Bernard Siegal. Madalina Ex. 23, pp. 1-2.

47. Mr. King said that, from the August 10 conference call, he understood Fiedler to be an associate of Mr. Castillo and the local engineer who would be handling the field work related to finding a site. King's contacts with respect to the Haltom City project were with Russo, Mr. Castillo and Fiedler. Madalina Ex. 23, p. 3. Mr. King later assigned the Madalina project to Alan Gearing, another principal of Jules Cohen. Madalina Ex. 23, p. 2. Mr. Gearing understood his work to be on behalf of Madalina, and he communicated both with Mr. Castillo and with Mr. Fiedler, who was assisting "with site location work." Madalina Ex. 24.

48. *Payment of Jules Cohen Retainer.* As described in an August 10, 1989 letter sent by Mr. King to Mr. Castillo,[8] a $1,750.00 retainer was required for Jules Cohen to begin work on Madalina's application. Poder Ex. 8; Madalina Ex. 23, p. 2. At the November 1991 hearing, Mr. Castillo initially testified that Madalina had paid Jules Cohen's retainer fee. Tr. 310. However, after being shown a September 19, 1989 letter he had written to Mr. King, which referred to an August 11, 1989 payment of the $1,750.00 retainer fee by TMS, Mr. Castillo admitted TMS had initially paid the fee. Castillo said that at first it had not been clear who was to pay the invoice, that TMS's payment had resulted from "the wrong procedure, an accident," and that he did not initially "catch" the fact TMS was not to pay that bill, as he had with Fiedler's TMS expense vouchers. Poder Ex. 9; Ex. 63; Tr. 310-312. Mr. Castillo claimed he could not recall the procedure which resulted in TMS's payment, whether he was the one who had authorized that payment, or how the error was eventually discovered. Madalina subsequently had Jules Cohen return the $1,750 to TMS and Madalina paid the fee. Poder Ex. 9; Tr. 312-315.

49. Mr. King testified Jules Cohen initially had received the $1,750.00 retainer check from Harbenito Broadcasting Company, "a subsidiary of" TMS. Madalina Ex. 23, p. 2. That check was executed by Mr. Castillo and Mr. Lykes. Madalina Ex. 31, Attachment A. He said that after receiving the September 19 letter enclosing a $1,750.00 check from Madalina and advising Jules Cohen to reimburse TMS, he forwarded to Mr. Castillo a check reimbursing TMS for the initial retainer. Poder Ex. 9; Ex. 63; Madalina Ex. 23, p. 2; Ex. 31, Attachment D; Tr. 2342.

50. At the May 1992 hearing session, Arturo Palacios, TMS's auditor/systems manager, testified that Castillo had taken a $1,750.00 "advance" from TMS, in the form of the $1,750.00 check written on the account of Harbenito Broadcasting Company, a now-defunct TMS subsidiary, in order to pay the Jules Cohen invoice. Madalina Ex. 31, p. 2. The Jules Cohen invoice had been sent to him with an "OK" for payment initialled by Ricardo Castillo on August 10, 1989. Joint Stipulation No. 4, pp. 37, 79; Tr. 2331-2332. Mr. Palacios testified that he then saw that the invoice was paid, charging the $1,750.00 payment to TMS Account "13.1219," a "miscellaneous receivables" account, as a receivable due from Mr. Castillo. Joint Stipulation No. 4, p. 36; Madalina Ex. 31, p. 2; Poder Ex. 4; Tr. 2334, 2336. Joint Stipulation No. 4, p. 36. The 13.1219 TMS miscellaneous receivables account is used to account for items "where repayment is expected but no separate account exists," and is sometimes used by TMS officers and employees for advances against future compensation. Madalina Ex. 31, p. 2. Mr. Palacios testified that the $1,750.00 "advance" to Mr. Castillo was repaid to TMS in September 1989. *Id.*

51. In a declaration attached to Madalina's December 11, 1991 opposition to the real-party petition to enlarge issues, Mac Tichenor also described TMS's payment of the Jules Cohen retainer fee as a mistake. He certified that the payment "should not have been made, since the Madalina application was not a TMS project. It is my understanding that TMS was reimbursed for this payment as soon as the error was discovered in September, 1989." Poder Ex. 59, p. 2. However, in his May 1992 hearing testimony, Mac Tichenor no longer characterized the initial payment by TMS as an "error." He testified he had "recently been informed" of that initial retainer payment, and that the payment had been charged to a miscellaneous receivables account and treated as an "advance" for which TMS was

[8] That letter was sent to Castillo at TMS headquarters and does not reference Madalina. It does note that site maps would be sent to Fiedler. Poder Ex. 8.

repaid in September 1989. Madalina Ex. 36, p. 8. When asked why he previously had characterized the payment as a mistake, he offered the explanation that it was a "mistake" for Madalina because it looked bad, but from an accounting standpoint for TMS, the payment was "correct." Tr. 2360.

52. *Further Involvement of Mr. Fiedler.* Once the Jules Cohen retainer had been paid, work proceeded on the technical portion of Madalina's application. Mac Tichenor testified that Castillo asked his permission to use Fiedler to help in the preparation of Madalina's application and that he did not object, provided it did not interfere with Fiedler's TMS duties and because it would give Mr. Castillo more time to address TMS business. Poder Ex. 59, p. 1; Madalina Ex. 36, p. 2.

53. During the month of August 1989, Fiedler worked with Jules Cohen and Mr. Castillo to locate an antenna site. Madalina Ex. 22, p. 3. Fiedler was involved in a number of telephone calls, letters and memos with Jules Cohen engineers, primarily Mr. King, to determine in what area Madalina's transmitter site would be located consistent with FCC spacing rules. Madalina Ex. 22, p. 4. On August 17, 1989, Mr. Gearing wrote Fiedler a letter discussing site considerations, providing maps showing permissible locations, and referring to an earlier conversation Mr. Fiedler had had with a representative of the Federal Aviation Administration (FAA) regarding location of a site for the Haltom City station. Poder Ex. 10, p. 2. After identifying the area within which a suitable site could be located, on August 21, 23 and 29-30, 1989, Fiedler travelled from his TMS office in San Antonio to the Dallas/Fort Worth area in order to search for a site for Madalina. Madalina Ex. 22, p. 3; Tr. 317.

54. Fiedler sought reimbursement for his expenses connected with the site-searching trips by submitting TMS expense vouchers to TMS's Accounting Department, "since no one had told [him] to do it any other way," and that was the routine procedure for expense reimbursement. *See* Poder Ex. 11 (three 1989 expense vouchers for travel to locate transmitter site); Madalina Ex. 22, p. 4; Tr. 318-319. None of the three TMS vouchers make any reference to Madalina, but under the entry for "[b]usiness reason or nature of benefit obtained or expected" each indicates the expenses were related to locating an antenna for a Haltom City FM application.[9] Poder Ex. 11, pp. 1-3. After receiving Fiedler's expense vouchers, TMS auditor Palacios sent them to Mr. Castillo, who reviews all TMS expenses, with a note asking Castillo if he wanted to approve Fiedler's expenses. Poder Ex. 7; Joint Stipulation No. 4, pp. 9, 12-14; Tr. 319-321, 578. Castillo responded "OK," and the vouchers were forwarded for TMS processing and TMS reimbursement. *Id.* Castillo said that he later realized Fiedler's expenses were not to be paid by TMS and stopped TMS processing of the expense vouchers before TMS had issued a reimbursement check. Madalina Ex. 31, p. 3; Tr. 321-322. The expenses were then paid by Madalina on September 26, 1989. Castillo maintained that his initial approval of payment of the expenses by TMS was due to an oversight.

55. It was Fiedler, whose duties at TMS include obtaining land for TMS stations, who first introduced Mr. Castillo to the real estate agent/broker, Marty Martinez, who finally located Madalina's proposed transmitter site. Madalina Ex. 26; Tr. 305-306, 323-325. Fiedler contacted Mr. Martinez after Castillo had suggested that he work with a real estate agent to find Madalina's site. Martinez and Fiedler then looked at 6 to 8 sites together on August 29, 1989. Madalina Ex. 33, pp. 3-4; Ex. 26; Ex. 33. The next day, August 30, Castillo, Fiedler, and Martinez met at Martinez's office to discuss Madalina's site requirements and then drove around searching for a site. Madalina Ex. 22, p. 4; Tr. 324. After Fiedler returned to San Antonio, Castillo continued looking at sites with Mr. Martinez and the option for Madalina's site was eventually negotiated. *Id.* Thereafter, in line with an August 17, 1989 request made to Mr. Fiedler by Jules Cohen engineer Alan Gearing, Fiedler provided Jules Cohen with maps of the chosen transmitter site. Poder Ex. 10.

56. In September 1989, Mr. Fiedler helped Alan Gearing resolve a question concerning the location of Madalina's antenna site on a map by drawing a schematic for guy wires for a tower at that site. Madalina Ex. 22, p. 4.

57. After Madalina's application was filed, in early 1990, Mr. Fiedler was involved in attempts to resolve Madalina's difficulties with the FAA concerning possible electromagnetic interference from Madalina's proposed station. Madalina Ex. 22, p. 5. On January 31, 1990, Mr. Castillo faxed to L&S several maps and a memo of the same date from Mr. Fiedler to Mr. Castillo concerning the FAA matter. Mr. Fiedler related in his January 31 memo that he had called the FAA contact person regarding Madalina's application and discussed the EMI problems. Fiedler also noted he had mentioned the nearness of an airport "to both King and Gearing during our phone conversations." Poder Ex. 33, p. 2. He then recommended how to proceed to locate a new site. *Id.*, p. 3. Mr. Castillo testified that Mr. Fiedler's contacts with the FAA had been made in response to Castillo's general request for assistance with issues concerning Madalina's application. Tr. 2632. On February 16, 1990, Mr. Fiedler faxed to Mr. Castillo a new signal contour map which he had prepared to show theoretical contours for Madalina's station at a reduced height, also in response to FAA concerns. Madalina Ex. 22, p. 5; Poder Ex. 34; Tr. 2633.

58. In addition to assisting on various aspects of Madalina's technical proposal, Mr. Fiedler helped develop the construction cost estimates for Madalina's budget for construction and initial operation of the station. Madalina Ex. 22, p. 5; Tr. 325. Castillo sought Fiedler's comments on sample construction cost estimates he had received from Madalina's counsel. Madalina Ex. 37, p. 9. On August 31, 1989, Castillo sent Fiedler a memo referencing their discussion earlier that day and listing cost factors such as transmitter equipment, tower, and studio equipment. Poder Ex. 12. Fiedler first gave Castillo quotes by telephone and later, in a September 22, 1989 memo, sent to Castillo "the cost projects for the Haltom City project." *See* Poder Ex. 13; Madalina Ex. 22, p. 5. Mr. Fiedler also advised Castillo on estimated operating costs relating to electricity and possibly

[9] The three read, "To locate antenna site for new Haltom City FM"; "To look for antenna site for FM application"; and "To check out antenna site for Haltom City FM allocation and meet with realtor." Poder Ex. 11, pp. 1-3.

engineering. *Id.* Castillo testified that "give and take" between him and Fiedler resulted in the final Madalina budget. Tr. 331-332. Although Fiedler's written testimony is that the only Madalina matter he assisted with after September 1989 was an FAA issue, Fiedler was still working on Madalina's budget after Madalina's application was filed on September 21, 1989, as reflected in a November 22, 1989 memorandum whereby Castillo sent to Fiedler a revised budget, noting he would telephone Fiedler to discuss budget estimates later that day. Madalina Ex. 22, p. 5; Poder Ex. 14; Tr. 328, 330-331.

59. *Involvement of Other TMS Employees.* TMS employees who currently work at TMS headquarters include Mac Tichenor, David Lykes, Mr. Castillo, Mr. Palacios, David Gerow, Tracey Medley, Valerie Hodge, Maria Hernandez, Kim DeMatteo and Jennifer Philpot.[10] Madalina Ex. 37, p. 3. Nearly all have worked on Madalina matters.

60. Specifically, Mr. Castillo utilized the services of each of his full-time administrative assistants, Lisa Martinez, then Loida Adrales,[11] then Valerie Hodge. He also had TMS's Tax Manager, David Gerow, work on Madalina matters. Mr. Castillo was the immediate supervisor of each of those employees and each of them performed services for Madalina at Mr. Castillo's request. Madalina also has received secretarial help from TMS employee Maria Hernandez and from Tracey Medley, Mac Tichenor's administrative assistant and TMS's personnel director. Madalina Ex. 37, pp. 3, 9. None of the TMS employees, including Mr. Fiedler, has ever received any compensation for performing services for Madalina from anyone but TMS and the work done on behalf of Madalina was performed during TMS work hours. Madalina Ex. 37, pp. 6, 9; Joint Stipulation No. 1, p. 1; Tr. 322, 334, 370-372.

61. Lisa Martinez, who was Castillo's administrative assistant from Spring to November 1989, worked on Madalina's budget and was in contact with Fiedler to discuss various estimates. Madalina Ex. 39, Tr. 333, 340. On September 1, 1989, she sent a memo to Madalina's then-FCC counsel, Larry Cohn, enclosing Madalina's operating and construction budgets and the Castillos' financial statement with a notation, "Please call should you have any questions." Poder Ex. 28; Ex. 16; Tr. 333. In a memo dated September 26, 1989, Ms. Martinez described her efforts in "analyzing" Madalina's budget, which Castillo had given to her to review and put into final form. *See* Poder Ex. 15; Tr. 333-334. In her memo, Ms. Martinez noted that she had tried, unsuccessfully, to contact Fiedler for assistance on the budget. Poder Ex. 15. Although acknowledging her lack of familiarity with technical terms, she reported to Castillo that Fiedler's projections were 7% over budget, noting variables in the types of equipment. *Id.* She recalculated the budget, reducing figures according to Castillo's instruction. Poder Ex. 16; Tr. 336-337. In his May 1992 hearing testimony, Mr. Castillo maintained that Ms. Martinez was incapable of independently analyzing budget information and that she did not estimate the figures in Madalina's budget. Madalina Ex. 37, p. 7. Ms. Martinez, who provided written testimony that she did not recall the specific circumstances of the September 26 memo, worked on Madalina's budget at TMS headquarters. Madalina Ex. 39; Tr. 334.

62. Ms. Martinez also arranged for local publication of the notice of the filing of Madalina's application. In a memo dated September 28, 1989, identifying herself as "from" Madalina, Ms. Martinez instructed the Fort Worth Star-Telegram on how to run the notice. Poder Ex. 18. Ms. Martinez also performed general secretarial services for Madalina. Madalina Ex. 39.

63. Loida Adrales, Castillo's administrative assistant from December 1989 to August 1990, described her efforts on behalf of Madalina as including typing and faxing correspondence, examining bills for double payments, preparing accounts payable reports, reconciling bank statements, typing checks and deposit slips, and maintaining Mr. Castillo's Madalina files. Madalina Ex. 33; Ex. 37, p. 8. In January 1990, at Mr. Castillo's request, Ms. Adrales researched the entries on Madalina's corporate savings account analysis statement by contacting a bank representative to determine the significance of each of the 16 entries on the statement and prepared a memo describing her research. Poder Ex. 54. Ms. Adrales also wrote a letter, which she personally signed, to the bank representative regarding Madalina's account on "Madalina Broadcasting, Inc." letterhead. Poder Ex. 53.

64. Although instructions as to placing the local notice of designation for hearing were sent to Madaline Castillo by L&S through a letter dated May 16, 1991, arrangements for local publication of that notice were handled by Valerie Hodge who, since August 1990, has been Mr. Castillo's administrative assistant. *See* Madalina Ex. 34, p. 1; Ex. 39; Poder Ex. 19, pp. 1-2. In a May 20, 1991 memo from Ms. Hodge to the Fort Worth Star Telegram concerning that local publication, the letterhead reads "Madalina Broadcasting, Inc." over the address of TMS's headquarters. Poder Ex. 19, p. 1. Ms. Hodge also assists Mr. Castillo on other Madalina matters, such as reconciling bank statements, providing TMS accountant David Gerow with information on Madalina's checking records, and updating Madalina's public file.[12] Those duties are not in her TMS job description, but are done at Mr. Castillo's request. Madalina Ex. 34, pp. 1-2; Ex. 37, p. 8.

65. All of Mr. Castillo's assistants have produced monthly reconciliations of Madalina's bank account by inputting into the TMS computer the information from check stubs they keep in files at their desks. Tr. 2660-2661. They have "processed" Madalina's checks, kept Madalina's checkbook, typed out checks for payments on behalf of Madalina, then mailed the checks after they were received bank executed by Mrs. Castillo, who must co-sign corporate checks with her husband. Madalina Ex. 33; Ex. 34; Ex. 39; Poder Ex. 58; Tr. 358. When asked at hearing why Madalina's checks are prepared by TMS employees at TMS headquarters, Mr. Castillo said it was because he and his wife do not have a typewriter upon which to type Madalina's checks. Tr. 427. But the Castillos do not type their personal checks when paying their household bills. *Id.* At the May 1992 hearing, Mr. Castillo testified that not all of Madalina's checks have been typed and sent by TMS staff. Madalina Ex. 37, p. 10.

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[10] Ms. DeMatteo is an accounting assistant. Ms. Philpot is a marketing assistant. Madalina Ex. 37, p. 3.

[11] Now Loida Adrales Moore. Madalina Ex. 33.

[12] A few days before the November 1991 hearing, Ms. Castillo placed a document into Madalina's public inspection file. Other than that one incident, Mr. Castillo and/or his assistants have maintained the file. Tr. 370-371.

66. David Gerow, an accountant employed full-time as the tax manager for TMS, has prepared the following tax documents for Madalina: (a) 1989 and 1990 U.S. Corporation Short-Form Income Tax Returns; (b) First Year Texas Corporation Franchise Tax Report; (c) 1990 Texas Franchise Tax Public Information Report; (d) Application for Employer Identification Number; (e) 1991 Texas Corporation Franchise Tax Report; (f) 1991 Texas Franchise Tax Public Information Report; and (g) Election to preserve the right to take a temporary credit against Texas Franchise Tax. Madalina Ex. 32; Poder Ex. 25; Ex. 26; Ex. 27.

67. Mac Tichenor testified at the November 1991 hearing that he allowed TMS employees to perform work for Madalina because,

> to the extent that, you know, that Ricardo or Madeline could use one of our people instead of going downtown and spend four or five hours out of the office hiring somebody and getting to know them, and so in, and so forth -- actually it took less time to use one of our employees to do something than to go do something independently -- I feel like we're better off -- TMS is better off.

Tr. 622. He later conceded that Madaline Castillo is not a TMS employee and therefore it would not be a concern to TMS if she took the afternoon off to hire a consultant. Tr. 626. In his declaration attached to Madalina's December 11, 1991 Opposition, Tichenor said he "now" understood other TMS employees, including Ms. Martinez, Ms. Hodge and Mr. Gerow, had assisted Madalina in various ways and that he had no objection to their use since their efforts did not interfere with their duties to TMS and freed Mr. Castillo's time to focus on TMS matters. Poder Ex. 59, p. 1.

68. TMS director Warren Tichenor did not know that TMS employees have worked on Madalina affairs during company time, but testified that since this relates to a project the Board "had expressed interest in funding or otherwise supporting," and if "it's being supervised properly" it would be within TMS's president's power to act. Joint Stipulation Number 3, pp. 17-19.

69. *Other TMS Connections.* Madalina utilized TMS accounts for overnight deliveries by services such as ECC and Lone Star Overnight. After an overnight delivery is made for Madalina on a TMS account, TMS is sent an invoice which includes the cost of deliveries by the overnight service, including deliveries for Madalina. In some instances TMS pays the entire invoice, and notes the payment on behalf of Madalina as a further advance under the "miscellaneous receivables" account. In other instances, the "normal" procedure would be for a copy of the TMS invoice to be sent to Mr. Castillo, who would then draft a check on Madalina's account made payable to the delivery service, to be included with the TMS check for the balance of the invoice. Poder Ex. 69; Tr. 2662-2674.

70. Correspondence concerning Madalina's application has been sent to Castillo, not at his home address, but at TMS headquarters. Castillo testified at the November 1991 hearing that beginning "sometime in 1990" nearly all of Madalina's correspondence and bills were being sent to its "formal address" at the Castillos' residence, rather than to TMS headquarters. Tr. 360-366. But a May 20, 1991 fax transmission to the Ft. Worth Star Telegram from Valerie Hodge, Mr. Castillo's administrative assistant, is on "Madalina Broadcasting, Inc." letterhead above TMS's 100 Crescent Court address. Poder Ex. 19; Tr. 298. Incoming bills and correspondence also continued to be sent to TMS headquarters in 1990-1991. June 25, 1990 and September 25, 1990, Jules Cohen bills were sent to TMS headquarters, as was a May 22, 1991 invoice from the Fort Worth Star Telegram. Poder Ex. 67; Tr. 361-363. Correspondence from Madalina's airspace consultants and the FAA also continued to go to TMS headquarters between July 1990 and June 1991. Tr. 364-365. Mr. Castillo testified at the May 1992 hearing that "most" communications to Madalina always have been mailed to the Castillo's home and the legal bills and correspondence were now being sent to that address, which is listed as Madalina's address in its FCC application. Faxes and some express mail packages are sent to TMS. Madalina Ex. 35; Ex. 27; Ex. 37, p. 15.

71. Madalina has never reimbursed TMS for the cost of long-distance telephone calls between Mr. Castillo and Mr. Fiedler while Fiedler searched for Madalina's site and helped estimate its construction and initial operating costs. Tr. 422-423. Additionally, Mr. Palacios testified that he has never been asked to have TMS reimbursed for the costs of copying, telephone calls and "faxing" involved in Castillo's work for Madalina and, as far as he knows, expenses for long distance calls and faxes are picked up by TMS. Joint Stipulation No. 4, p. 44.

72. In October 1991, Valerie Hodge faxed to L&S attorney Joseph Belisle a confirmation letter for Mr. Belisle's trip to Washington in November 1991. That confirmation letter, signed by the reservations manager of the Park Hyatt Hotel, is addressed to Mr. Belisle "Tichenor Media System, 100 Crescent Ct., Suite 1777, Dallas, Texas." Joint Stipulation No. 1.

73. *TMS Financing.* At the time its application was filed, Madalina was relying on two sources of funding, MESBIC Financial Corporation of Dallas (MESBIC) and Riverway Bank. Madalina Ex. 25; Tr. 341. After Madalina's application was filed, partly to avoid having to give up as much as 50% of Madalina's equity to MESBIC in order to obtain its financing,[13] and partly to obtain financing from a "local bank," Castillo continued to search for other sources of funds. Tr. 451-452. In late November 1989, after unsuccessful efforts to obtain a loan letter from North Carolina National Bank, Castillo approached Mac Tichenor about TMS providing a loan to Madalina. At a meeting held January 15, 1990, TMS's Board of Directors discussed Madalina's application and the loan, including the risk of

[13] The MESBIC loan would include warrants for the purchase of up to 50% of Madalina's equity, in non-voting stock, according to Castillo. Madalina Ex. 1, pp. 9-10. (January 2, 1990 MESBIC letter); Tr. 352. The original 1989 MESBIC letter, which Mr. Castillo had obtained through his personal friend, MESBIC president Tom Gerron, had not specified that the warrants would be for non-voting stock and, at that time, Madalina was authorized to issue only voting stock. Tr. 342-343. Mr. Castillo testified at the November 1991 hearing that, as of the time the MESBIC letter was issued, MESBIC probably believed the warrants would be for voting stock. Tr. 345. Madalina later amended its application to provide for non-voting stock and Castillo obtained a January 1990 letter from MESBIC specifically stating that the stock would be non-voting. Tr. 345, 347-348.

it not being paid, and reviewed and approved a loan letter dated January 8, 1990. Madalina Ex. 36, p. 3; Ex. 37, p. 5; Ex. 38; Poder Ex. 62, p. 3. Under the January 8 loan letter, drafted by a TMS attorney and signed by Mac Tichenor, TMS agreed to loan Madalina up to $500,000, with a right to convert the loan on a proportionate basis, based on the book value of the stock, into as much as 80% of Madalina's total "book value equity," in the form of nonvoting stock. Madalina Ex. 1, pp. 12-15; Ex. 29; Ex. 30, Tr. 610. Furthermore, in order to avoid dilution of its potential equity interest in the event Madalina also obtained financing from MESBIC (with the attendant warrants to that entity), TMS also obtained an option to provide all of the financing for construction and initial operation of Madalina's station, as long as the additional $1,087,856 in financing is on the same or better terms as MESBIC's. *Id.;* Tr. 451. If Madalina wins the construction permit and TMS is asked for a large advance on the loan for construction, staffing, and operations, Mr. Tichenor will be told what the money is to be used for. Tr. 601.

74. Under the TMS loan letter, a copy of which was included in a January 1990 amendment to Madalina's application, interest will be at 1% over prime. If Madalina wins the construction permit, no payments will be due until one year after commencement of station operations. If Madalina does not receive the permit, full payment will be due within fifteen days after final dismissal or denial of Madalina's application. Madalina Ex. 37, pp. 10-11. The Castillos are not required to personally guarantee repayments of any of the loans they receive from TMS. Madalina Ex. 1, Attachment C; Tr. 596-597. The terms and conditions of the January 8 loan letter, including the decision not to seek personal guarantees, was decided by TMS. Tr. 610-611, 616.

75. When asked why TMS would wait until final action on Madalina's application before requiring any repayment, Mac Tichenor explained that would be when Madalina will either have money available from station operations or be able to "refinance" to pay back TMS. Tr. 593. However, when pressed by the Presiding Judge, Tichenor admitted that if Madalina does not receive the construction permit, it probably would *not* be able to get "refinancing," and "[t]hat loan's going to be a problem. I think repayment of that loan is going to be problematic if that happens." Tr. 595. Mr. Tichenor stated that TMS "might not get paid back" the up to $500,000 it will loan for prosecution costs if Madalina's application is not granted. Tr. 597.

76. Mac Tichenor maintains that while a bank might require a personal guarantee, the only reason TMS is in the Madalina deal is that Mr. Castillo is a "valued TMS employee." Thus, he said, this is not "simply a business deal" and the right to press the Castillos on a personal guarantee is "counter-productive" since TMS "would not be inclined to sue a valuable employee on a personal guarantee." Poder Ex. 59, p. 3; Madalina Ex. 36, pp. 5-6. Mac Tichenor testified that the TMS board of directors believed that the "risk-reward potential was more than sufficient" to justify the loan. Madalina Ex. 36, p. 5. He described TMS's risk as "almost an equity-type risk," requiring that TMS be entitled to "virtually the same return that the equity is getting. Tr. 2382. In his 1992 written hearing testimony, Mac Tichenor said he understood that cases involving major markets often settle and a settlement would generate funds to repay Madalina's loan. "Thus, in my judgment, the overall risk of loss to TMS was and is relatively small...." Madalina Ex. 36, p. 6.

77. Mac Tichenor testified that TMS has a policy of assisting Hispanics in starting new businesses and that there have been two other instances where TMS has made loans which were not personally guaranteed. The first involved a 1989 loan made in conjunction with the sale of TMS's Corpus Christi AM station to a partnership owned partly by former TMS employees. Madalina Ex. 36, p. 4. There, TMS converted debt into equity and now holds a 26% limited partnership interest in the licensee. *Id.* However, TMS did end up with personal guarantees when another lender to the transaction required them, and the borrower is to repay the funds even if the station makes no money. *Id.* p. 5; Tr. 615. TMS also lent money to a company owned by Benjamin Rodriguez to finance start-up of a food manufacturing business, En Casa Foods, Inc. TMS also took an equity interest in that company. Madalina Ex. 36, p. 4. While no personal guarantees were required, the record is silent as to whether, unlike Madalina's situation, there were physical assets to secure the loan.

78. As of the May hearing, Madalina had already "drawn down" over $140,000.00 in funds under the TMS loan letter. Madalina Ex. 31, p. 1; Tr. 429, 583, 2377. The Castillos had not put any money into Madalina's coffers since mid-November 1989, at which point they had put in $13,000. Tr. 356, 436. Madalina has not paid any principal or interest on the TMS loans. Tr. 427-428. TMS's Palacios had calculated the interest due to be $6,868.23 as of the May 1992 hearing, but those calculations were not made until after Palacios had testified at his April 8, 1992 deposition. Madalina Ex. 31, pp. 1-2; Joint Stipulation No. 4, p. 31; Tr. 2676-2677.

79. Under the loan relationship with Madalina, Mac Tichenor has authority to approve TMC loan advances. If Castillo needs money to pay a Madalina bill, he must ask Tichenor and Tichenor has the discretion to say "no" when a TMS advance is requested. Tr. 2351. Tichenor has the right to refuse to advance any more money if in his view there has been a materially adverse change in Madalina's prospects in securing the grant of its application. Tr. 2352-2353. Tichenor decides whether there is a material adverse change warranting refusal to provide an advance. Tr. 2253.

80. Mr. Tichenor became aware of the site issue against Madalina when he was shown a copy of the order adding the issue. Tr. 587. At that point, Mac Tichenor decided that there had been a material adverse change in Madalina's prospects, and he decided not to advance additional funds. However, after participating in two conference calls with Castillo and Madalina's FCC counsel and after reviewing Madalina's defense of the site issue, he decided to advance more funds. Tr. 2354-2358. Mr. Tichenor was also involved in a conference call in which Madalina and counsel were trying to settle financial arrangements. Tr. 2366, 2637, 2641. Ricardo Castillo also informed Mr. Tichenor about settlement talks. Tr. 588. At one point Mr. Tichenor asked for hearing transcripts to review to determine whether to re-establish credit to Madalina. Tr. 2634. Tichenor also stated that an initial decision denying Madalina's application, even on the comparative issue, would constitute a material adverse change, giving TMS an opportunity to determine whether it wanted to continue to fund the application through an appeal. Tr. 2420-2422.

81. At the November 1991 hearing, Mr. Castillo testified that in order to obtain advances under the TMS letter, he had made only oral requests to Mac Tichenor for funds, and that there was no documentation of the TMS loans

other than checks written to Madalina by TMS. Tr. 356-357, 428. At his April 1992 deposition, Mr. Palacios testified that the process for obtaining advances is for Castillo to request an amount from Palacios, and Palacios then writes up a request for a check which is submitted to Mac Tichenor for approval. During discovery in the spring of 1992, Madalina produced documents showing advances from TMS's Harbenito "13.1219" account for Madalina. Poder Ex. 66; Joint Stipulation No. 4, p. 19.

82. A financial accounting on Madalina's relationship with TMS has never been included in any TMS financial report to its shareholders, officers, directors or lenders, other than its inclusion under a general "receivables" heading which encompasses other accounts as well. The general receivables accounting has not reflected any interest due from Madalina since Palacios was not told to compute the interest. At his April 1992 deposition, Palacios decided he would include the interest due in the next TMS financial report. Joint Stipulation No. 4, pp. 30-35.

83. In March 1990, Mac Tichenor asked attorney Bruce Hallett to prepare loan documents, including a draft promissory note, to "flesh out" the terms of the January 8 Madalina loan letter. Poder Ex. 55; Tr. 2344-2346. Mr. Hallett prepared drafts of a revolving convertible promissory note, a letter agreement relating to conversion of debt to equity, and resolutions of the TMS board of directors regarding the promissory note. Hallett was paid for that work by TMS. Poder Ex. 56, pp. 1-2; Ex. 57, pp. 1-2; Madalina Ex. 28, pp. 1-2; Tr. 2346-2349. Later in 1990, Hallett revised those documents. Poder Ex. 56, pp. 3-4. However, after Hallett pointed out to Mac Tichenor that creation of a note would require notification and approval of the Madalina loan by TMS's lender and, potentially, the pledging of that note as collateral to its lender, TMS decided not to pursue the documentation any further. Thus, none of the documents prepared by Hallett were executed. The relationship with Madalina was left "less formal" and TMS has no intent to obtain an executed note in the future. Madalina Ex. 36, pp. 3-4; Tr. 2349-2350.

84. When asked at hearing whether TMS would exercise its option to convert its debt into non-voting stock if Madalina were to obtain the Haltom City license, Mac Tichenor said that TMS would exercise that option, noting, "that's part of the economic benefit we bargained for." Tr. 2374. He then said, "I would think we would either take 80% or negotiate to buy the option from TMS." Tr. 2374. At deposition also, Tichenor testified that if Madalina were successful, TMS did intend to convert its debt into up to 80% of Madalina's equity. Tr. 2357. Tichenor testified that, based upon the approximately $140,000 it had advanced to Madalina as of the May 1992 hearing (assuming TMS could exercise its conversion rights as of the time of the hearing) TMS already is entitled to receive 80% of Madalina's equity. Tr. 2357, 2377-2378.[14] The only reason Tichenor could think of as to why TMS had not taken non-voting stock and opted instead for conversion privileges at some future date was that it did not know the percentage equity which would be contributed by the Castillos or others, or how much the total TMS loan would be. Tr. 2379.

85. *Loan from MESBIC.* In September 1991, Mr. Castillo decided, after first discussing the matter with Mac Tichenor, that Madalina would borrow $5,000 from MESBIC. Tr. 355, 599-600.[15] The MESBIC loan was personally guaranteed by the Castillos, was at an interest rate of 14% and repayment had already begun as of the November 1991 hearing. Tr. 453, 470-471. When questioned why Madalina would borrow money from MESBIC at 14% when it could borrow from TMS at about 8.5%,[16] with no payment due until after final action on its application, Mr. Castillo admitted that one reason was to try to show Madalina is not wholly reliant on TMS for its funds. Tr. 466-467. Mac Tichenor also testified that Mr. Castillo had taken the MESBIC loan because of concerns about "appearances," hoping to show there is other financing available to Madalina. Tr. 599. However, the only funds in the checking account[17] from which the MESBIC loan payments are being made are the proceeds of TMS advances. Tr. 471-472. Castillo said he does not want to borrow more money from MESBIC because of the requirement he and his wife provide personal guarantees and the 14% interest rate. Tr. 2634-2635. Instead, Mr. Castillo said, Madalina will continue to borrow money from TMS. Tr. 470.

86. *Relationship with Mac Tichenor.* Ricardo Castillo keeps Mac Tichenor fully apprised of what has been happening with respect to Madalina's application. He discussed his 1991 deposition testimony with Tichenor within a day after the depositions occurred. Tr. 571-572. He talked to Tichenor about settlement negotiations between the Haltom City applicants and he advised him of the specification of the transmitter site issue against Madalina. Tr. 587-588. When Castillo requests funds from TMS, he gives Tichenor an itemized list of Madalina's expenses, which Tichenor looks over prior to approving disbursement of loan advances, and he gives Tichenor an "update on how it's going, what the issues are out there...." Tr. 586, 588-589. In fact, Mac Tichenor sets up specific appointments to discuss Madalina's application so that Castillo "can cover the points he wants to cover with me and make sure that I am up to speed." Tr. 586-587. Since about May 1991 Ricardo Castillo and Mac Tichenor have met once or twice a

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[14] The conversion is based on the book value of the company, Tichenor testified. Tr. 2376. Although Tichenor was not certain what the Castillos had put into Madalina, he calculated that, assuming they had put in $35,000 and TMS had put in $130,000, those two figures would be added together to come up with a book value of $165,000. Since a TMS loan of $130,000 would equal about 80% of the company's book value. TMS would get the nearly 80% if conversion were done then. Tr. 2377-2378. In fact, TMS has put in over $140,000 (Tr. 2377), and the Castillos only $13,000. Thus, the calculation would still result in TMS obtaining 80% equity, under Tichenor's procedure.

[15] At hearing, Mr. Castillo was confused about the procedure for borrowing the $5,000 from MESBIC. *See e.g.*, Tr. 456-458. He said that the money had been borrowed under MESBIC's January 2, 1990 loan letter, but that letter provides that $75,000 would be made available for prosecution expenses "subject to point one of this letter," that is, that Madalina receives the construction permit. Obviously, that term had not been met as of the time the September 1991 loan was taken down. At hearing Mr. Castillo admitted it appeared the loan had been made separately, not under the terms of the January 1990 letter. Tr. 456-457, 467, 469-470.

[16] As of the November 1991 hearing, the prime rate was about 7.5%. Tr. 452-453. Since the interest rate for the TMS loans is prime plus 1%, the interest rate on a TMS loan would have been about 8.5%.

[17] Other than the $5,000 Madalina borrowed from MESBIC.

month, each meeting lasting about 15 minutes. Madalina Ex. 36, p. 7. Tichenor testified that after Madalina builds the station and borrows money for operating costs Castillo will continue to advise him on how money is being spent. Tr. 601. Mac Tichenor's administrative assistant keeps a company file on Madalina under Mac Tichenor's "immediate jurisdiction." Tr. 2380.

87. *TMS Interest in Dallas/Ft. Worth Market.* TMS is in the process of expanding to other markets. Already entrenched in the four top Hispanic markets in Texas, it has been approached by station owners in the fifth largest such market -- Dallas/Fort Worth -- about purchasing AM stations there, but TMS has not seriously considered or pursued such offers. Poder Ex. 59, p. 1; Madalina Ex. 36, p. 1; Tr. 373-374.

88. In 1986, TMS's board of directors adopted a resolution that the company concentrate on the top-ten Hispanic markets in the country. Madalina Ex. 36, p. 1; Tr. 2324. Mac Tichenor testified that TMS looks at Hispanic radio markets by Hispanic population and that, when setting the 1986 policy, it looked at Arbitron data regarding the Hispanic population in various markets. Tr. 2400-2401. At that time, Dallas/Ft. Worth was not within the top-ten. Madalina Ex. 36, p. 1; Tr. 2326. Tichenor further testified that he keeps tabs on what the top-ten Hispanic markets are, and, as of the May 1992 hearing, Dallas still is not a top-ten Hispanic market. He maintained that "to the best of his knowledge," Dallas was not within the top-ten Hispanic markets in 1989 or 1990, but that it is 13th or 14th. Tr. 2329, 2331, 2401, 2411. He said if he found Dallas to be within the top-ten Hispanic markets, he might change his mind about TMS's interest in that market. Tr. 2327.

89. Tichenor testified that TMS has subscribed to, and relies upon, the research performed by Strategy Research Corporation (SRC) and TMS's marketing materials have utilized the list of the "top-ten" from SRC. Tr. 2330-2331. He later claimed he was unable to say exactly what list TMS uses in determining the top-ten Hispanic markets, but that whatever list it is, Dallas is not on it. Tr. 2404. He said the most current top-ten listing TMS has is the document used in its marketing presentation prepared by David Lykes about a year ago. Tr. 2405-2406.

90. David Lykes, who, for the past four or five years, has prepared TMS marketing presentations which reference the top-ten Hispanic markets, provided written testimony that TMS has in its files certain documents showing the top-ten Hispanic markets and the ranking of Dallas. Those documents include 1984 and 1989 SRC analyses of the "U.S. Hispanic Market," which show that Dallas/Ft. Worth is the 13th and 12th largest Hispanic market, respectively. Madalina Ex. 52, p. 1 and Attachments; Tr. 2406. The 1989 SRC document, which lists Tichenor Spanish Radio as the study sponsor, notes that the 1989 Hispanic population in the Ft. Worth/Dallas ADI had increased 55% over the 1985 population figures. Madalina Ex. 52.

91. Lykes testified that TMS also has in its files the 1990 "Hispanic Almanac" (Edition Two, 1990), and Madalina submitted certain pages of that publication listing the Dallas/Ft. Worth ADI as the 14th Hispanic market.[18] However, other pages from the same document, which were subsequently proffered by Prairie and admitted into evidence, list the Dallas/Ft. Worth MSA as the projected eighth largest Hispanic market in 1990, up from tenth place in 1985, and reports sizable gains in Hispanic populations. Prairie Ex. 35, pp. 2-6. Further, a March 1992 issue of *Hispanic Media and Markets*, published by Standard Rate and Data Service, shows Dallas/Ft. Worth as number nine nationwide in ADI ranked by Hispanic population and Hispanic households.

Comparative Issue
Ownership Structure and Formation

92. Madalina is a two-tiered Texas corporation. Its two voting stockholders are Ricardo Alverez del Castillo and his wife, Madaline Alverez del Castillo, each holding 50% of the corporation's voting stock. Madalina Ex. 1, p. 1. Both are officers and directors. Madalina Ex. 1, p. 1. The facts surrounding Madalina's formation are set forth under the Real Party issue, discussed, *supra*.

Integration

Ricardo A. del Castillo

93. Mr. Castillo proposes to work full-time (at least 40 hours per week) as general manager of Madalina's proposed station. His duties will include responsibility for setting all station policies and practices, hiring and firing all employees, and making decisions regarding major expenditures. He testified that he will resign from all other business and employment commitments to effectuate his integration proposal. Madalina Ex. 3, p. 1.

94. *Minority.* Mr. Castillo is an Hispanic male. Madalina Ex. 3, p. 1.

95. *Local Residence and Civic Activities.* Mr. Castillo resided within the 1 mV/m service contour of Madalina's proposed radio station from 1973 to 1980 and again from August 1988 to the present. Madalina Ex. 3, p. 1; Tr. 375.

96. Mr. Castillo has taken part in the following civic activities within the proposed service area of Madalina's station:

(a) Board member, Arthritis Foundation of North Texas, 1990-present.

(b) Board member, Dallas, Dallas Center For the Developmentally Disabled, April 1991-present.

(c) Committee member, Media-Advertising Partnership for a Drug-Free America, 1989-present

(d) Member, Leadership Dallas Alumni Association, 1980-present. His only involvement from March 1980 to August 1988 was to pay dues.

(e) Leadership Dallas, 1979-1980.

(f) Board member, Dallas Services for Visually Impaired Children; 1974-1979.

(g) Board member, Dallas Mexican Chamber of Commerce, 1974.

[18] Madalina also submitted a 1991 SRC "U.S. Hispanic Market" listing Dallas/Ft. Worth as the 13th largest Hispanic market, with a Hispanic population growing 5% over two years and Hispanics representing 14% of Dallas county's total population base. It also presented a list from TMS's "current Chicago presentation" listing the top-ten Hispanic markets, which did not include Dallas. Madalina Ex. 52.

(h) Regional Director, Dallas Regional Minority Purchasing Council, 1979.

Madalina Ex. 3, p. 3; Tr. 376. The record does not reflect the amount of time Mr. Castillo devoted to each activity.

97. *Broadcast Experience.* From 1980 to 1988 Mr. Castillo was employed as general manager of Station KLAT(AM), Houston, Texas. In August, 1988 he became Vice President for Operations of TMS. Madalina Ex. 3, p. 2; Tr. 379.

Madaline A. del Castillo

98. If Madalina's application is granted, Madaline Castillo proposes to work full-time (at least 40 hours per week) as operations manager of Madalina's station. She will oversee the station's public affairs/news programming, its traffic, continuity, and special events departments, and she will administer Madalina's EEO program. Mrs. Castillo will resign from all other business and employment commitments to effectuate her commitment to Madalina's station. Madalina Ex. 4, p. 1.

99. Mrs. Castillo has not worked full-time outside her home since the Castillos started their family in 1976. Tr. 375, 477. She has no plans to work full-time outside the home if Madalina's application is not granted. Tr. 477, 503.

100. Mrs. Castillo learned of the availability of the Haltom City allocation at the end of July 1989. She learned of that from her husband. Tr. 478. She is aware that Madalina was assisted by Fiedler of TMS in locating Madalina's transmitter site. Tr. 478-479. Her husband was the primary contact with Fiedler as well as Alan Gearing of Jules Cohen & Associates. Tr. 479. Also, she never spoke to Larry Cohn of Cohn & Marks, Madalina's initial FCC counsel and never spoke to anyone at Leibowitz and Spencer prior to the retention of Madalina's current counsel. Tr. 480. At her deposition, Mrs. Castillo testified that the decision to hire L&S was made by her husband; at the hearing she stated that her husband suggested L&S and they "decided together." Tr. 480-482. Mr. Castillo also contacted Bruce Hallett about representing Madalina as its corporate counsel. Tr. 483.

101. Mrs. Castillo did not hire John Allen, Madalina's airspace consultant and is not certain who did. Tr. 482. However, at her husband's request, she spoke on the phone to Allen as well as Gearing about the FAA problems with the site. Mrs. Castillo accepted the characterization of her role as a "go between" for the two of them regarding the FAA. Tr. 514-515, 517-518.

102. It was Mr. Castillo who arranged for the Riverway Bank, TMS and MESBIC loan letters. Mrs. Castillo never contacted any financial institution to obtain a financing letter for Madalina. Tr. 486-487. Mr. Castillo also arranged for the MESBIC loan and the TMS advances. Tr. 488-489. She had no contact with Mr. Fiedler regarding estimates. Tr. 485. Mrs. Castillo has never discussed Madalina's financing arrangement with TMS or Mac Tichenor, nor has she participated in any discussion with MESBIC or TMS about their options to become owners of Madalina stock. Her source of information about this subject has been her husband. Tr. 488.

103. Mrs. Castillo first learned in the summer of 1991 that a condition to Madalina's purchase of its transmitter site was that zoning approval be obtained. Tr. 500. She and her husband have discussed the possibility of donating a park to North Richland Hills only briefly; her husband would be "the one to talk to about that." Tr. 496. Mr. Castillo is the one who discussed the zoning matter with counsel; she has not, nor has she contacted any North Richland Hills city officials about the matter. Tr. 496-497.

104. Mr. Castillo opened Madalina's corporate bank account. Tr. 489. She and her husband are signatories on the account and both have to sign the checks. Tr. 489. Mr. Castillo pays Madalina's bills at his office at TMS. Mr. Castillo keeps the corporations records at his office. Tr. 509, 511. Mr. Castillo also arranged for the publication of the notice of the filing of Madalina's application. Tr. 483-484.

105. Mrs. Castillo was not involved in obtaining equipment estimates or projecting estimated operating costs. Mr. Castillo obtained the equipment cost estimates. Also, Mr. Castillo estimated operating costs including costs for operating the operations department which Mrs. Castillo is slated to head. Tr. 485-486. Mrs. Castillo's job description was written by Madalina's counsel; she did not discuss her proposed duties with counsel prior to the preparation of her job description. Tr. 502-503.

106. *Minority.* Mrs. Castillo is an Hispanic female. Madalina Ex. 4, p. 1.

107. *Local Residence and Civic Activities.* Mrs. Castillo has resided within the proposed service area of Madalina's station as follows: (a) Dallas, Texas, 1968-1970; (b) Farmers Branch, Texas, 1973-1977; (c) Carrollton, Texas, 1977-1980; and (d) Irving, Texas, August 1988-present. *Id.;* Tr. 491.

108. Ms. Castillo has been active in the following civic activities within the service area of Madalina's proposed station:

(a) PTA and PTA Committees, T. J. Lee Elementary School, Fall 1988-present.

(b) PTA, Travis Junior High School, Fall 1988-Spring 1991.

(c) PTA-MacArthur High School, September 1991-Present.

(d) PDI (Mentally Handicapped) Classroom Volunteer, T. J. Lee Elementary School, September 1991-Present.

(e) Arthritis Foundation, Member of Hispanic Committee, Summer 1991-Present.

(f) Clipped Bees, Community Volunteers comprised of Ex-Braniff Flight Attendant Employees, 1973-1976.

(g) Little League Team Mom, Summer 1990-1991.

Madalina Ex. 4, p. 2; Tr. 475-477. The record does not reflect the amount of time Ms. Castillo devoted to such activities.

Diversification

109. Mr. Castillo is an officer, director and less than 1% shareholder of TMS, the licensee of WIND, Chicago, Illinois; WOJO(FM), Evanston, Illinois; KLAT, Houston, Texas; KGBT and KIWW(FM), Harlingen, Texas; KCOR, San Antonio, Texas; and KBNA AM/FM, El Paso, Texas. Additionally, TMS owns a 26% limited partnership interest in the licensee of KRAB-FM, Robestown, Texas, and KUNO(AM), Corpus Christi, Texas. It also owns, through SRN, a 50% general partnership interest in Stations WADO(AM), New York, New York; WGLI(AM), Babylon, New York; and WQBA AM/FM, Miami, Florida. Madalina

Ex. 2, p. 1; Ex. 37, Attachment A; Tr. 297. Mr. Castillo has pledged to resign his positions as officer and director of TMS and to divest his TMS stock interest in the event Madalina's application is granted. Madalina Ex. 2, p. 1.

110. Mrs. Castillo has no media interests. Madalina Ex. 2, p. 1.

Auxiliary Power

111. Madalina proposes installation of an auxiliary power generator at both the transmitter and main studio sites. Madalina Ex. 5, p. 1.

Poder Broadcasting, Inc.
Site Availability Issue
Description of Poder's Transmitter Site

112. Poder's transmitter site is located in Keller, Texas, on property near Golden Triangle Road adjacent to the tracks of the Union Pacific Railroad Company (Union Pacific). The site extends onto three parcels of land. Parcel 1, where Poder's tower base and northern guy wire anchor will be located, is owned by Union Pacific and is leased by the railroad to Yates Building Supplies, Inc. (Yates). Yates subleased this property in October 1987 to Keller Building Supply, Inc. (KDS), which operates a lumber yard at the site.[19] Poder Ex. 72, p. 1; Poder Ex. 74, p. 1; Prairie Ex. 36, p. 1; Tr. 2888-2889; 3101-3102.

113. Union Pacific also owns a second and smaller (200' x 240') parcel (Parcel 2) which will accommodate Poder's southern guy wire anchor. Poder Ex. 72, p. 1 & 4; Poder Ex. 74, p. 1; Prairie Ex. 36, p. 1; Tr. 2889. This parcel has never been leased to Yates or KBS. Parcel 3, where KBS' lumber yard is located, will accommodate the third guy wire anchor. This third parcel was owned by Yates and leased to KBS until July 10, 1992, when Yates sold the parcel to 201 Golden Triangle, Inc. (201), a corporation owned by KBS' stockholders. Poder Ex. 72, pp. 1-2; Poder Ex. 74, pp. 1-2; Tr. 3078, 3109-3110.

114. The master lease between Union Pacific and Yates is dated July 11, 1980. Paragraph 9 of the master lease provides:

> This lease and all of its provisions shall inure to and bind each party's heirs, legal representatives, successors and assigns; provided, none of Premises shall be sublet and no right of Lessee shall be transferred or assigned either voluntarily or involuntarily, except by express written agreement acceptable to Carrier.

Prairie Ex. 36, p. 8.

When Yates sublet the property to KBS, a Consent to Sublease was executed by Union Pacific, Yates and KBS on October 14, 1987. The Consent to Sublease contained certain terms and conditions pursuant to which Union Pacific was willing to give its consent to the sublease to KBS. It further stated:

> Section 2. The parties hereto agree that nothing herein shall be deemed or construed to authorize Lessee or Sublessee further to let or sublet the subleased premises, or further to transfer or assign any interest in said Basic Lease Or sublease without the written consent of Carrier first had and obtained.

Prairie Ex. 36, pp. 12-15.

Spellman Lease

115. Poder's reasonable assurance of site availability has been based on lease agreements entered into on August 21, 1989, between KBS and Thomas E. Spellman, who had applied to the FCC to drop in the Haltom City frequency. These agreements are reproduced in Poder Ex. 74, pp. 4-14. Spellman assigned his rights under those agreements to Poder on September 27, 1989. Poder Ex. 72, p. 1; Tr. 2965. The assignment agreements are reproduced in Poder Ex. 74, pp. 15-19.

116. Spellman contacted Ed Keith in 1989 concerning the possibility of leasing a portion of KBS' property for building a radio station. Poder Ex. 74, p. 1; Tr. 3075. Keith is vice president, a director, and 20% owner of KBS. He also manages the company on a daily basis. Poder Ex. 74, p. 1; Tr. 3126, 3124. KBS was operating the lumber business in 1989 and had a sign up at the lumber yard.[20] Tr. 3074. Keith had previously worked for Yates for 17 years, and has worked on the lumber yard premises for approximately 20 years.[21] Tr, 3121, 3124.

117. Keith testified that Spellman visited him on approximately six or eight occasions regarding his proposal to construct a radio station tower at this location. Some of Spellman's visits lasted more than 30 minutes. Tr. 3072-3073. On a couple of occasions, Spellman brought an engineer with him as well as some drawings showing the locations of the tower and guy wires in relation to KBS' buildings and operation. Poder Ex. 74, p. 2; Tr. 3075. Spellman and Keith discussed Spellman's drawings and how the proposed construction would affect KBS' operations. Keith informed Spellman that the proposed tower would not interfere with KBS' operations if it were located as shown in the drawings. *Id.*

118. In their discussions concerning a lease of the property to Spellman, Keith informed Spellman that the property on which he wanted to construct the tower was owned by Union Pacific, and that KBS was subleasing the property from Gordon Yates who had leased it from the railroad. Tr. 3076-3077, 3103-3104. At that time, Keith believed Parcel 2 (200' x 240' parcel which will accommodate Poder's southern guy wire anchor) was covered under the Yates lease with Union Pacific, and, thus, was

[19] KBS was formed in 1987 and bought out the Yates business. Tr. 3121.

[20] Yates did not have a sign on the premises. Tr. 3074.

[21] Keith appeared at the hearing pursuant to a subpoena and was represented by Nancy Haney, a Texas attorney. Tr. 3113-3114. Poder paid for Keith's airfare to travel to Washington and has agreed to pay Keith's attorney's fees up to the amount of $5,000. Poder did not compensate Keith for the time he spent in Washington or for the declaration (Poder Ex. 74) he provided. Prairie Ex. 49, p. 1; Tr. 3005-3007, 3113-3114.

included in Yates' sublease with KBS.[22] Poder Ex. 74, p. 1; Tr. 2932. Keith told Spellman KBS would consider subleasing the property to him, but that approval of any tower construction on the railroad's property would be subject to the railroad's review and approval. Poder Ex. 74, p. 2; Tr. 3076. Keith also told Spellman it would be premature to request such approval from the railroad until he was ready to construct the tower. Poder Ex. 74, p. 2; Tr. 3115, 3076-3077. Keith stated that KBS has had a good relationship with Union Pacific, and told Spellman he did not anticipate a problem in obtaining the railroad's approval at the appropriate time. Poder Ex. 74, p. 3; Tr. 3115-3117.

119. Union Pacific's property has been leased to Yates since July 1980. Prairie Ex. 36, p. 1; *see* Tr. 3135-3136. Since that time, the railroad has never expressed an interest in using the property that Yates and KBS have leased. Tr. 3136. KBS has never constructed anything on the property it is leasing from Union Pacific. Gordon Yates built the existing railroad spur on the property which now belongs to KBS.[23] The railroad was required to approve construction of the spur. No other buildings have been constructed on the property. Tr. 3100-3001. In Keith's discussions with Spellman concerning obtaining the railroad's permission for construction on the property, they discussed the fact Union Pacific had approved construction of the spur. Tr. 3122.

120. On August 21, 1989 Thomas E. Spellman d/b/a North Tarrant Radio Tower Co. signed a lease agreement with KBS in which Spellman agreed to lease the portion of the tract of land in the Jessie Billingsley Survey, Abstract No. 70, Tarrant County, Texas which was described in Exhibit A to the lease. The portion described is the 200 x 674 foot parcel and a portion of the Yates/201 property. Poder Ex. 74, pp. 4 and 9. An Addendum to the Lease Agreement, also bearing the date of August 21, 1989, reflects that the Agreement is actually a sublease and the property is owned by "Railroad Company." Paragraph 11 of the Addendum states:

> The terms, conditions and covenants contained herein and in the Lease Agreement are subject to the rights of the Railroad...

Poder Ex. 74, p. 12.

Assignment to Poder

121. During September 1989, Poder entered into an agreement with Spellman whereby he agreed to assign his rights to lease property in Keller, Texas.[24] As consideration for Mr. Spellman's assignment of the transmitter site lease and addendum to the lease and Spellman's "leg work" in securing the Haltom City allotment, Poder executed a promissory note to Mr. Spellman in the amount of $15,000 plus 10.5% annual interest payable only upon the sale of all of Poder's non-voting stock. Praire Ex. 11; Tr. 979-980, 1010.[25]

122. Before assigning his rights under the lease agreements, Spellman contacted Keith to obtain KBS' approval. KBS informed Spellman it did not have any objection to the assignment, and gave him permission to assign his sub-sublease to Poder. Tr. 3080-3081.

123. Keith informed Gordon Yates of Poder's proposal in 1989 and asked whether he had any objection. Tr. 3129-3130. Mr. Yates reviewed Poder's proposal, including where the tower and guy wires would be located. Mr. Yates told Keith that anything KBS wanted to do was fine. Tr. 3141, 3129-3130. Keith explained that KBS had a good relationship with Yates. Tr. 3129-3130. In 1992, Keith contacted the current president of Yates, Lacy Jo Yates, concerning Poder's proposal. She also had no objection. Tr. 3130, 3132-3133.

124. Garza claimed that at the time Poder filed its application in September 1989, he understood that KBS owned part of the property required for Poder's proposed site and that it had leased the remaining portion which was owned by Union Pacific. Tr. 2967-2969, 3035-3036. Garza asserted his understanding was based on his conversations with Spellman and his review of the lease agreement and addendum between KBS and Spellman. Tr. 2966, 2976, 3039-3040, 3050. KBS did not produce Spellman as a witness on the site availability issue to corroborate Garza's account of their transactions. However, Garza's assertion that Spellman was the source of his belief that KBS owned part of the property is contradicted by the testimony of Keith, Poder's witness. Keith, who was allegedly the source of Spellman's knowledge, made clear that KBS did not own any of the required property at the time of his discussions with Spellman. Further, he explicitly told Spellman that KBS was sub-leasing the property from Gordon Yates who in turn was leasing from the railroad, the owner of the property. Keith further advised Spellman that KBS would consider a further sub-lease to Poder if the railroad approved. Tr. 3073-3074, 3076-3077.

125. Garza's further assertion that the addendum provides a basis for his understanding that KBS owned part of the property on which Poder seeks to construct its tower is even more implausible. When confronted with the Addendum, Garza, an attorney, was forced to admit that the Addendum makes clear that the leased property is owned by the railroad (Union Pacific) and that KBS holds only a sublease. Tr. 3040-3045; Poder Ex. 74, pp. 11-13.

126. Although admittedly familiar with the Addendum, Garza did not contact anyone at Union Pacific prior to August 1992. Tr. 2994, 2997-2998, 3045. He asserts Poder

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[22] Keith was mistaken. Parcel 2 is owned by Union Pacific and has not been leased to Yates or anyone else. Poder Ex. 74, p. 1; Tr. 2890-2891; *see* Prairie Ex. 36, p. 1.

[23] Keith testified that Yates is continuing to lease Parcel 1 from Union Pacific, and KBS is subleasing the property from Yates. At the time KBS purchased Parcel 3 from Yates, Mr. Yates wanted to protect the spur and told KBS to keep the lease up. Mr. Yates has no interest in the property other than the railroad spur. Keith stated that after next year, Mr. Yates no longer will be on the lease and KBS will be leasing the property directly from Union Pacific. Tr. 3133.

[24] Harry Martin was Spellman's FCC counsel. Tr. 958. After the frequency was allotted in August 1989 and Spellman decided not to file an application, Martin contacted Garza, who had previously worked at Martin's law firm while attending law school. Tr. 955-959, 976-977.

[25] Other than his discussions with Spellman in 1989, Garza has not had any further discussions with Spellman regarding the site. Tr. 2995.

was prohibited from contacting the railroad by the August 21, 1989, addendum between KBS and Spellman which had been assigned to Poder. Tr. 2969. Paragraph 15 of the addendum states:

> Lessee agrees that he will not attempt to purchase the Leased Premises or otherwise interfere with the business relations that exist or may hereafter exist between Lessor and the Railroad or its assigns.

Poder Ex. 74, p. 13. Garza's claimed interpretation of paragraph 15 was that by contacting the railroad Poder would be interfering with KBS' lease. Tr. 2969-2970. He interpreted the word "interfere" to mean to jeopardize in any way the lease agreement between KBS and the railroad. Garza explained, "I thought by initiating discussions with them, there may be a potential for that. So I did not...." Tr. 2974. Garza further testified that although he may have interpreted the addendum broadly, Spellman interpreted the addendum in the same manner.[26] Tr. 2969-2970. Garza did not ask anyone at KBS if they had objections to his contacting the railroad. Tr. 2974-2975, 2982. In fact, Garza never spoke to Keith or anyone else at KBS obtaining approval from the railroad. Tr. 994. Also, although he consulted with FCC counsel to determine whether the documents provided reasonable assurance, he did not ask counsel's advice whether the language precluded his contacting the railroad. Tr. 2970-2972, 2974-2975.

127. Garza did not review the lease agreement between Union Pacific and KBS. Tr. 2970-2971. Keith could not recall whether he refused to give Spellman and Martin a copy of the master lease. Tr. 3135. Garza's discussions with counsel concerned reviewing the engineering he had received, the lease agreement between KBS and Spellman, and the assignment of the lease. He did not inquire whether he needed to review the railroad's lease with Yates or KBS. tr. 2972-2973. Garza and Martin did not discuss whether he should contact the railroad, but only whether, based on the documents they had, Poder had reasonable assurance of the availability of its site. Tr. 2973.

128. As noted in paragraph 117, *supra*, at the time Keith negotiated the lease agreement with Spellman, Keith believed Parcel 2 (200' x 240' parcel which will accommodate Poder's southern guy wire anchor) was covered under the Yates lease with Union Pacific, and, thus, was included in Yates' sublease to KBS. Poder Ex. 74, p. 1; Tr. 2932. Keith indicated he has maintained Parcel 2 ever since KBS entered into a sublease with Yates. Tr. 2934. However, as a result of the filing of Prairie's April 29, 1992, motion to enlarge issues, Poder and Keith discovered that Parcel 2 was not included in KBS' lease with Union Pacific. Tr. 3033-3034, 3051; *see* Poder Ex. 74, p. 1. Parcel 2 is owned by Union Pacific and has not been leased to Yates or anyone else. Prairie Ex. 36, p. 1; Tr. 2889-2891.

129. Garza learned that Poder's site extended onto three parcels of land around the time of his July 1992 deposition. Tr. 3033-3035. Following his deposition, he and Martin reviewed the specific parcels of land, who they belonged to, and where the guy wires were going to be located. Tr. 3033-3034. Garza testified that although he knew from the beginning that KBS "controlled" property,[27] it was not until after his deposition that he became familiar with the specifics of who owned each piece of property. Tr. 3036.

130. With respect to Parcel 3, Poder had no knowledge of Yates' connection with the proposed site until sometime after July 13, 1992. Prairie Ex. 46, p. 3. Garza believes it was after his July 1992 deposition that Yates was identified as having leased part of Union Pacific's property. Tr. 3037. Garza testified that following his deposition, Martin informed him that Yates had sold Parcel 3 to 201 Golden Triangle (201). Garza could not recall exactly when he learned about 201, but believed it was shortly before August 27, 1992. Tr. 3012. Garza has not contacted 201 directly, but believes Martin has communicated with 201 through his conversations with KBS because the major stockholders of each company are the same. Tr. 3013-3014.

Poder's Dealings with Union Pacific

131. Penny L. White has been Manager of Contracts and Real Estate for Union Pacific for eight years. She has been responsible for Union Pacific's property in the Dallas, Texas area for two years and obtained all of her predecessor's files which she has reviewed. Tr. 2884. The first time Ms. White heard the name Spellman was at the time of her deposition in this proceeding on July 31, 1992. The first time she heard the name Poder was around the time she received the subpoena for her deposition in July 1992. Tr. 2892. Poder stipulated during Ms. White's testimony that no one at Union Pacific at any time has ever given Spellman permission to use Union Pacific's property. Tr. 2895-2896.

132. According to Ms. White, until the middle of July 1992, no one had even asked Union Pacific about placing a 350 foot tower on its property or any guy wire on its property. By the end of July 1992 Union Pacific had not consented to any proposal to place a 350 foot tower on its property. Tr. 2920-2921. Ms. White testified that the lease Union Pacific has with Yates and KBS clearly stipulates that the Railroad must consent to a further lease and the master lease stipulates that the "premises shall be used solely as the site for lessee's lumber yard." Tr. 2925-2926. Ms. White confirmed that Union Pacific has to consent to the construction of any building or structure on the premises and also has to consent to the use of the premises for anything other than a lumber yard. Tr. 2926.

133. When Union Pacific was renegotiating rental terms on the KBS lease during late 1990 and 1991, correspondence was exchanged but none of the correspondence concerned the question of the tower proposed by Poder. The first time Ms. White heard from Ed Keith concerning the Poder proposal was when he and she were subpoenaed. Tr. 2919. At that time Keith said that Poder was proposing to put a tower on property owned by Union Pacific. Tr.

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[26] Although Garza is a lawyer, he claims he relied upon Spellman because employment law (Garza's specialty) is substantially different from real estate law and he is inexperienced in dealing with real estate contracts. Tr. 2974-2975, 3050-3051. Garza's explanation that he relied on a layman to interpret a legal document is not credible and is rejected.

[27] Garza defined "control" as "having the authority to assign portions of the property." Tr. 3042.

2919-2920. Poder stipulated that it had no preliminary approval to use Union Pacific's property in July 1992. Tr. 2920.

134. Ms. White made it clear that neither Spellman nor Poder were precluded from contacting Union Pacific prior to July 1992. She further stated that KBS was in no way precluded from contacting Union Pacific about Poder's proposal to locate a 350 foot tower on Union Pacific's property. Tr. 2921-2922.

135. On approximately August 21, 1992, Ms. White was sent a draft of a Declaration by Martin, Poder's FCC counsel. Prairie Ex. 43; Tr. 2915-2916. The draft declaration stated:

> Union Pacific consented to a sublease from Gordon Yates Building Supplies, Inc. to Keller Building Supplies, Inc. effective October 14, 1987. Union Pacific will consent to a further sublease to Poder upon completion of our standard written agreement with Yates, KBS and Poder. We know of no reason why such agreements cannot be completed once Poder is ready to construct its facility.
>
> In order to accommodate construction of the radio station tower, Union Pacific has preliminarily agreed to add to its lease agreement with Gordon Yates Building Supplies, Inc. the 200 x 240 foot parcel Union Pacific not currently under lease [sic] that is adjacent to and immediately south of the subject parcel.

Prairie Ex. 43.

136. Ms. White modified the draft Declaration to reflect that Union Pacific was preliminarily agreeable to eliminating certain property from the Yates lease and entering into Union Pacific's standard agreement directly with Poder with the understanding that Poder would bear any expense involved in the relocation of the Yates fence. The revised Declaration also stated that the agreement with Poder would include the 200 x 240 foot parcel Union Pacific owns which is not currently under lease. Prairie Ex. 43; Tr. 2917. Ms. White's revised Declaration was executed on August 25, 1992. Ms. White testified that prior to August 25, 1992 no one connected with Union Pacific ever gave permission for Spellman or Poder to use the Union Pacific property and the August 25 Declaration is only a preliminary approval which would ultimately have to be approved by Union Pacific's Communications' Department and the Superintendent of Union Pacific's Operating Department. Tr. 2882-2883, 2895. When asked how much of the 200 x 674 foot parcel Union Pacific would be taking out of its lease with Yates and KBS, Ms. White said, "I haven't exactly figured it out. It would be measured 8-1/2 feet to the south of the spur track and everything in that little triangle..." (Tr. 1990). Ms. White has never discussed with Yates changing their lease although any proposal that would have involved a sub-sublease to Poder would have required Yates' consent. She has not discussed changing KBS' lease with KBS. Tr. 2917-2919. Ms. White further stated that no one has ever discussed with her the placement of a transmitter building on Union Pacific property and this is something Union Pacific's communications department would need to address. Tr. 2922. She was not aware whether Union Pacific in connection with approving other tower sites, has approved the construction of small buildings at the base of the tower. Ms. White did not anticipate any problem in gaining approval for such a building if it is typically constructed along with a tower. Tr. 2937.

Renewal of Poder's Lease

137. Poder's original lease agreement with KBS expired in August 1991. Tr. 3088, 2996. Poder attempted to renew its lease at that time, but the lease was not renewed until August 25, 1992. Tr. 3000. Keith stated KBS could not renew Poder's lease prior to this date because KBS had been negotiating a new rental price with Union Pacific for Parcel 1 where Poder's tower will be located.[28] Poder Ex. 74, p. 2. During the time KBS was negotiating with the railroad, Martin contacted Keith periodically. Keith told Martin he would not renew Poder's lease until KBS secured a renewal of the Yates lease with Union Pacific. Poder Ex. 74, p. 2. Keith also told Martin he expected that the rent negotiations would be successfully completed and that Poder could continue to specify the property as its site. *Id.*

138. Keith testified that Martin came to Texas to meet with him sometime in 1992. At that time, KBS had not yet reached an agreement with the railroad. Martin had discussions with Keith about contacting the railroad, but Keith told Poder not to contact Union Pacific until KBS had signed an agreement with the railroad regarding its rental terms. Tr. 2976, 3090; *see* Tr. 2897. Keith told Martin that when KBS got its "lease" from the railroad, they would get back with him. Tr. 3090. In approximately May 1992, Martin again visited Keith. Keith testified:

> He wanted to know if he could call the railroad and I told him no. When we got our lease, when we had our lease, then he would have his.

Tr. 3091.

139. In order to expedite the lease arrangement between Union Pacific and KBS, Poder offered to pay the difference of $1500 per year between Union Pacific's proposed rental price and what KBS was willing to pay. Prairie Ex. 48, p. 3; Tr. 3002-3002. However, the eventual arrangement between Union Pacific and KBS did not require Poder to provide any funds. Tr. 3002-3003.

140. Yates entered into a "Supplemental Agreement" with Union Pacific in June 1992. Prairie Ex. 36, p. 14,[29] Poder Ex. 74, p. 2; Tr. 2897-2898, 3090-3091, 3003, 3105-3106. The June 7, 1992, Supplemental Agreement provides that the parties desire to modify their July 11, 1980, "Basic & Agreement" by "decreasing the rental." The

[28] Penny L. White, Manager of Contracts and Real Estate for Union Pacific, testified that during the period from late 1991 to 1992, Yates and KBS renegotiated their rental terms with Union Pacific, but not the entire lease. Tr. 2896-2897; *see* Prairie Ex. 36, p. 1.

[29] Prairie Ex. 36, p. 14, is fax numbered page 017 of that exhibit. *See* Tr. 2906.

Supplemental Agreement further provides, "... nothing herein contained shall be construed as amending or modifying the same except as herein specifically provided." Prairie Ex. 36, p. 15. According to Keith, the June 1992 Supplemental Agreement is for a term of one year, and Union Pacific does not have the right to terminate the "lease" prior to the expiration of that term. Tr. 3105-3106.

141. During the period in which KBS was renegotiating its rent, KBS continued to lease the property and pay rent to Union Pacific. There has never been a break in KBS' lease of Union Pacific's property since the time Spellman entered into a sublease with KBS in 1989. Tr. 3134.

142. On June 30, 1992, Martin sent a check in the amount of $1000 to Loy McDonald for a renewal and extension of Poder's sublease with KBS. Prairie Ex. 49, p. 1; Tr. 3003-3004, 3095-3096. KBS has cashed Poder's check. Tr. 3095-3096.

Comparative Issue
Ownership Structure and Formation

143. Poder is a Texas corporation with 300 shares of Class A voting stock (VS) and 700 shares of Class B non-voting (NVS) authorized. All of the Class A voting stock and 450 shares of the Class B non-voting stock have been issued. The ownership and management of Poder is as follows:

Name	Position	No. of Shares	Voting Interest	Equity Interest
Frank J. Garza	President/ Director	100(VS)	33 1/3%	13 1/3%
Daniel A. Rubio	Vice-President/ Director	100(VS)	33 1/3%	13 1/3%
Gabriela G. Garcia	Secretary/ Treasurer/ Director	100(VS)	33 1/3%	13 1/3%
Q Prime Inc.	None	450(NVS)	0	60%

Poder Exhibit 1, p. 1.

144. Q Prime is a former applicant in this proceeding who merged with Poder just prior to the hearing. Under the merger agreement Poder agreed to sell Q Prime 450 of the 700 authorized shares of Class B non-voting stock in return for Q Prime's payment of $40,000 for the stock and a commitment to lend Poder up to $175,000 for prosecution expenses. Poder Ex. 22, p. 1-2. Q Prime is a corporation that is owned entirely by two individuals, Clifford N. Burnstein and Peter D. Mensch. The voting stock is evenly split between Mr. Burnstein (50%) and Mr. Mensch (50%). There is no non-voting stock in the corporation. Mr. Burnstein and Mr. Mensch are the corporation's only directors. Mr. Burnstein is the corporation's Co-President and Treasurer; Mr. Mensch is the corporation's Co-President and Assistant Treasurer. Poder Ex. 1, pp. 1-2.

145. Poder's bylaws specifically prohibit its nonvoting stockholders from acting as an employee, independent contractor or agent of the corporation or otherwise becoming actively involved in management or operation of the corporation's business. Poder Exhibit 21, ¶ 17. The Bylaws also prohibit, any nonvoting stockholder from communicating with the officers, directors, or employees of the corporation on matters pertaining to the day-to-day operations of the business[30] or providing services to the corporation, except to make loans to, or act as a surety for, the corporation's business. *Id.;* Tr. 1074. Thus, Poder's governing documents provide adequate insulation to ensure Q Prime will remain a "passive" principal.

146. Poder's principals have a financial stake in the application. As of October 31, 1991, Mr. Garza had put in $4,141.96; Ms. Garcia had paid $5,745.00; and Mr. Rubio had paid $3,679.00. Poder Exhibit 10. Those funds were paid to cover such expenses as the cost of engineering for the application, the FCC filing fee, the FCC hearing fee, and legal notices. *Id.;* Tr. 802-803. Those investments will not be reimbursed from the proceeds of any Q Prime advances. Tr. 823.

147. Poder's principals expect to pay additional expenses related to Poder. Tr. 851, 874, 879, 983. Mr. Garza testified that the three voting stockholders have discussed the question of making additional capital investments and intend not to rely exclusively on Q Prime for payment of expenses related to Poder's application, but to put more of their own money into Poder as well. Tr. 983. Furthermore, Poder's principals will have an additional financial stake in the applicant through personally guaranteeing the bank loan which will be utilized to construct and operate Poder's station. Tr. 796.

Integration

Frank J. Garza

148. If Poder's application is granted, Frank J. Garza will serve as the station's general manager on a full-time basis (a minimum of 40 hours per week). In that capacity, he will have overall supervision responsibilities for all day-to-day station operations, including programming, sales, financial and engineering matters. Poder Ex. 2, p. 1.

149. Mr. Garza, presently an attorney in the City Attorney's Office in Dallas, Texas, will terminate that employment prior to the commencement of program tests by the new station. He will have no other employment commitments that will interfere with his duties as full-time general manager of the FM station. *Id.*

150. *Minority.* Mr. Garza is an Hispanic male. Poder Ex. 2, p. 3.

151. *Local Residence and Civic Activities.* From October 1986, to February 16, 1992, Garza resided at 6029 Village Glen, No. 4156, Dallas, Texas, located within the service area of Poder's proposed FM station. Poder Ex. 2, p. 1. On

[30] Section 2.4 of the merger agreement prohibits "any role in day-to-day management" of the station. Moreover, the restrictions in Poder's bylaws prohibiting any active involvement in operation or management of the business or communications on day-to-day operations, also provide sufficient insulation. The fact Poder's "charter" does not also include those specific provisions is irrelevant, since the corporation's bylaws govern its actions and procedures.

February 17, 1992. Mr. Garza moved about 2 1/2 miles outside Poder's proposed service area, to 2751 Groveridge, Dallas, Texas. He will move back into the service area prior to commencement of operations by Poder's new station. Poder Ex. 2, Amendment.

152. Mr. Garza has been involved in the following civic activities within the proposed service area of Poder's station:

a. October 1989 to Present -- Board of Directors, Big Brothers and Sisters of Dallas. Mr. Garza's responsibilities include being Chairperson of the Recruitment Committee, responsible for helping recruit minorities as big brothers and sisters. Normally, he spends 15 hours a month on these duties, but during the months of July, August and September, 1991 he spent about 30 to 45 hours a month.

b. January 1987 to Summer 1991 -- Volunteer, Big Brothers and Sisters of Dallas. For five years, Mr. Garza was matched as a big brother with a youth in the Dallas/Fort Worth area and served as a role model and source of support for this youth. He met with this youth at least twice a month.

c. February 1991 to Present -- Speakers Bureau, United Way of Dallas. Mr. Garza has helped raise money for the United Way by travelling to different organizations in the Dallas area and giving speeches. He spends approximately three to five hours a month doing this, depending on the number of engagements that he has.

d. May 1988 to Present -- Mexican-American Bar Association. This association is involved with social issues affecting Mexican-Americans living in the Dallas/Fort Worth area. Mr. Garza worked with the *Pro Bono* Committee in helping assign cases to attorneys. He spends approximately five hours a month doing this.

e. November 1990 to Present -- Continuing Education Speakers Bureau, Urban League Youth Council of Dallas. Mr. Garza has travelled to various junior high schools in the Dallas/Fort Worth area and given speeches emphasizing the importance of staying in school. He spends approximately five hours a month doing this.

f. May 1989 to February 1991 -- Mexican-American Professionals for Education. This organization provides scholarships to needy Mexican-Americans in the Dallas/Fort Worth area. Mr. Garza has participated in various fundraisers to raise money for the scholarships. He spent approximately four hours a month doing this.

g. September 1988 to January 1991 -- Volunteer, I Have A Dream Foundation. Mr. Garza's work with this organization included being assigned three students who were "at risk" of dropping out. He met regularly with these students, tutored them and encouraged them to stay in school. He spent approximately ten hours a month on this activity.

Poder Ex. 2, pp. 1-2.

153. *Broadcast Experience.* From October 1980 to August 1983, Mr. Garza worked at Station KMOL-TV in San Antonio, Texas as a production assistant, sports producer and reporter. Poder Ex. 2, p. 3.

Daniel A. Rubio

154. If Poder's application is granted, Daniel A. Rubio will serve as the station's program director on a full-time basis (a minimum of 40 hours per week). As program director, he will directly supervise all announcers and other over-the-air personnel, implement and maintain the station's programming format and be responsible for the development of all news, public affairs and other special programs. Poder Ex. 3, p. 1.

155. Mr. Rubio is presently employed full-time as a computer analyst by KPMG Peat Marwick. He is a manager in the Management Consulting Division of the Technology and Operations Group. He will terminate his employment with the firm prior to commencement of program tests of the proposed FM station. Accordingly, Mr. Rubio will have no other work commitments that will interfere with his duties as full-time programming director of the proposed station. *Id.*

156. *Minority.* Mr. Rubio is an Hispanic male. Poder Ex. 2, p. 3.

157. *Local Residency.* Mr. Rubio maintained a residence in Dallas, Texas, within the proposal area of the station, from the Summer of 1986 until November 1987. He then moved to Irving, Texas, also in the proposed service area, and he continues to reside in Irving. Poder Ex. 3, p. 1; Tr. 143.

Gabriela G. Garcia

158. If Poder's application is granted, Gabriela G. Garcia will serve as the station's business manager on a full-time basis (a minimum of 40 hours per week). As business manager, she will be responsible for supervising all aspects of the station's operations involving human resources (payroll/personnel/benefits) and finances, includes financial planning, accounting, collections and budgeting. Poder Ex. 4, p. 1.

159. Ms. Garcia presently is employed full-time as Senior Credit Analyst with Hoechst-Celanese Chemical Group, Inc., headquartered in Dallas/Fort Worth. However, prior to commencement of program tests of the proposed FM station, she will terminate her employment. Accordingly, she will have no other work commitments that will interfere with her duties as the full-time business manager. *Id.*

160. *Minority.* Ms. Garcia is an Hispanic female. Poder Ex. 4, p. 2.

161. *Local Residence and Civic Activities.* Ms. Garcia lived within Poder's proposed service area, from June 1986 to August 1989. Since August 1989, Ms. Garcia has resided in Dallas, Texas, just outside the service area of the proposed station. Poder Ex. 4, p. 1.

162. Ms. Garcia has been involved in the following civic activities within the proposed service area of Poder's station:

a. November 1983 to Present -- Educational Committee, Dallas Hispanic Chamber of Commerce. Ms. Garcia has helped raise funds for scholarships for Hispanics in Dallas. She spends approximately 4-8 hours a month on this activity.

b. May 1989 to February 1991 -- Mayor's Hispanic Task Force. Ms. Garcia helped prioritize Hispanic issues for the Mayor of Dallas, devoting approximately 4-6 hours a month to that activity.

c. December 1988 to January 1991 -- Volunteer, Big Brothers and Sisters of Dallas. Ms. Garcia served as a big sister to a youth in the Dallas area, spending approximately 2 hours a month on this activity.

d. January 1988 to November 1989 -- Board Member, City of Dallas Housing Corporation. Ms. Garcia has petitioned the federal government and other sources for funds for the City of Dallas to help first-time and low income home buyers. Additionally, she approved construction permits for building projects which, when completed, sectioned some areas for lower-income renters. She spent approximately 6-10 hours a month doing this.

e. December 1986 to October 1988 -- Arlington Chamber of Commerce. Ms. Garcia was a liaison between First Interstate Bank and the Chamber of Commerce. She spent approximately 3 hours per month on this activity.

Poder Ex. 4, p. 2.

Diversification

163. Neither Poder, nor any of its voting principals, have any interest in, or connections with, any medium of mass communications. Poder Ex. 5.

164. The two owners of Poder's non-voting stockholder, Q Prime, Clifford N. Burnstein and Peter D. Mensch, each also owns 50 percent of the voting stock in, and is an officer and director of, Ionosphere Broadcasting Corporation, Stratosphere Broadcasting Corporation, Troposphere Broadcasting Corporation and Atmosphere Broadcasting Corporation, which are the sole general partners in Ionosphere Broadcasting Limited Partnership, Stratosphere Broadcasting Limited Partnership, Troposphere Broadcasting Limited Partnership and Atmosphere Broadcasting Limited Partnership, respectively. *Id.*, p. 2.

165. Ionosphere Broadcasting Limited Partnership holds a permit to construct a new FM broadcast station at Woodlake, California (File No. BPH-850712PK, Call Sign KQKX). Stratosphere Broadcasting Limited Partnership is the licensee of FM broadcast station KWTT-FM, Los Osos-Baywood Park, California. Troposphere Broadcasting Limited Partnership holds a permit to construct a new FM broadcast station at Greenfield, California (File No. BPH-850712TI, Call Sign KSEA). Atmosphere Broadcasting Limited Partnership owns 100 percent of the issued and outstanding stock of Double D Broadcasting Company, the licensee of FM broadcast station KRAB, Green Acres, California. *Id.*

166. Messrs. Burnstein and Mensch also are the only limited partners in Ionosphere Broadcasting Limited Partnership, Stratosphere Broadcasting Limited Partnership, Troposphere Broadcasting Limited Partnership and Atmosphere Broadcasting Limited Partnership, and are the only officers and directors of Double D Broadcasting Company. *Id.*

167. Q Prime, Inc. is also an applicant for permits to construct new FM broadcast stations at Clarksville, Indiana (File No. BPH-890905ME), Vancouver, Washington (File No. BPH-890411MA), White City, Florida (File No. BPH-890914NV), and Mt. Juliet, Tennessee (File No. BPH-891012MT). *Id.*

Auxiliary Power

168. Poder will install auxiliary generators at its studio and transmitter sites for use in emergency power outage situations. Poder Ex. 6.

Prairie Broadcasting, Inc.
Comparative Issue
Ownership Structure and Formation

169. Prairie is a for-profit corporation organized under the laws of the State of Texas. The company has authorized and issued 100 shares consisting of 51 shares of Class A common voting stock and 49 shares of Class B common non-voting stock. All of the shares of Class A common voting stock are held by Kimette Glenn, a resident of Irving, Texas, who is the sole officer (President and Secretary) of Prairie, and the sole director. Raquel Caballero, who lives in New York, New York, is the sole Class B non-voting shareholder. Thus, Kimette Glenn holds 100% of the voting shares and 51% of the equity of Prairie and Ms. Caballero holds 0% of the voting shares and 49% of the equity. Prairie Ex. 1, p. 1.

170. Ms. Glenn was 36 years old at the time of the hearing and testified at that time that she has known Ms. Caballero for approximately ten years. Tr. 1142. She became well acquainted with Ms. Cabellero while working as an account executive at Cabellero Spanish Media, Inc. (CSM), a national rep company for Spanish radio stations (Tr. 1148-1149); 1298-1299; Prairie Ex. 2, p. 3. At the time that Ms. Glenn worked at CSM, Ms. Caballero was active in CSM of which she is a 45% shareholder. Tr. 1148-1149. Ms. Caballero no longer works at CSM. She is retired and as of November 1991 had not worked for three and a half years. Tr. 1286, 1301. Eduardo Caballero, Ms. Caballero's husband also owns 45% of CSM. Tr. 1085.

171. After Ms. Glenn learned from Charles Crawford her husband,[31] about the Haltom City application, she contacted an FCC attorney and then contacted Ms. Caballero to ask if she would be interested in participating as a non-voting stockholder in an application. Tr. 1296-1297. Ms. Glenn contacted Ms. Caballero because she had known her for ten years, knew she was financially capable and thought that she would recognize this as a good business opportunity (*Id.*). Ms. Caballero understood that Ms. Glenn's role in the applicant would be very active and also understood that she herself was not going to be participating actively in the application or operation of the station. Ms. Caballero agreed to be a non-voting stockholder solely for financial reasons. Tr. 1297.

[31] Mr. Crawford is general sales manager for the Southwestern Region of CSM. Crawford holds the title of vice president but is not a corporate officer. He is not a director of CSM and has no ownership interest. Prairie Ex. 1, p. 2; Tr. 1084.

172. It was Ms. Glenn who hired Prairie's attorneys and engineers. Tr. 1088-1092. Ms. Glenn learned of Ben Perez, her first FCC attorney because he represented Mr. Caballero previously. No one suggested she call Perez. Tr. 1089. She selected Prairie's present counsel after consulting a friend. Tr. 1089, 1270. Ms. Glenn negotiated with her tower site owners. Tr. 1125-1126. She worked with her attorney in calculating the costs of operation and construction. Tr. 1127-1138. Ms. Glenn prepared Prairie's Articles of Incorporation and prepared and signed Prairie's application. Ms. Glenn's personal investigations were the basis for the request to add issues against Bruton and Poder. *See e.g. MO&O*, FCC 92M-302, released March 10, 1992 and Prairie Ex. 36. Ms. Caballero did not see a copy of the application before it was filed. Tr. 1143, 1287. Ms. Caballero played no role in preparing the application or in prosecuting the application. The only thing she has done is to provide funds. Tr. 1300. As of November 18, 1991 Ms. Glenn had contributed $33,237.44 to Prairie[32] and Ms. Caballero had contributed $26,915.00. Prairie Ex. 22.

Integration

173. Ms. Glenn proposes to work full-time (40 or more hours per week) as general manager of Prairie's proposed Haltom City station. Her proposed duties will include hiring, firing and supervising station management, and determining policies regarding programming, production, personnel, business practices, equal employment opportunity and affirmative action and community relations. Ms. Glenn proposes to be in charge of ascertaining the problems, needs and interests of the community and the service area and to establish public affairs and news programming to meet such problems, needs and interests. Prairie Ex. 2, p. 1. Ms. Glenn does not plan to hire a full-time sales manager at the proposed station, but contemplates using a "rep" firm for national sales. Tr. 1095-1096.

174. As of the hearing, Ms. Glenn was a fifth-year associate attorney employed by the law firm of Haynes & Boone, in Dallas, Texas. She pledged to terminate her employment to work as full-time manager, in the event Prairie's application is granted. She also has pledged to terminate or curtail any social, civic, business or other activities which interfere with the proper performance of her duties as general manager. Prairie Ex. 2, p. 1-2. Tr. 1084.

175. *Local Residence and Civic Activities.* Ms. Glenn currently resides in Irving, Texas, within the 3.16 mV/m contour of Prairie's proposed station. She intends to continue residing there while integrated. Except for the four years she was in college and two years she spent in Oklahoma, the 36-year old Ms. Glenn has lived within the proposed service area all of her life. Prairie Ex. 2, p. 2; Tr. 1301.

176. Ms. Glenn has participated in the following civic activities:

a. Ms. Glenn has been involved in her local public neighborhood action committee, which, in 1989-1990, opposed a street reconstruction project. Ms. Glenn attended city council meetings, contacted city council members and conducted legal research. She also attended city council and neighborhood meetings relating to another legal issue. Prairie Ex. 2, p. 4. Ms. Glenn did not describe the amount of time she devoted to those activities.

b. From 1987 to the present, Ms. Glenn has spent approximately 20 hours per year providing *pro bono* legal services through the Dallas AIDS Legal Hospice. Prairie Ex. 2, pp. 4-5.

c. Ms. Glenn has been involved with ProBar Texas, a non-profit organization organized in conjunction with the American Bar Association and the Texas Bar Association to provide volunteer legal assistance to persons who are detained by the INS in the Texas Valley, and are seeking political asylum in the United States. Since May 1990, she has spent about 70 hours in representing a juvenile Honduran refugee. Prairie Ex. 2, p. 5. Ms. Glenn has been honored for her *pro bono* activities through the Dallas AIDS Legal Hospice and ProBar Texas. Prairie Ex. 2, p. 6.

d. Since May 1988 Ms. Glenn has served as a Moot Court Judge at the annual Southern Methodist University law school moot court competition. That activity has consumed approximately 6 to 10 hours per year. Prairie Ex. 2, p. 5.

e. Ms. Glenn has been involved with the Dallas, Texas chapter of Hearts and Hammers, a national non-profit organization that primarily assists elderly and handicapped homeowners in making improvements to their homes as necessary to bring them into compliance with housing codes. In April 1991, she spent approximately 20 hours on activities for that organization. Prairie Ex. 2, p. 5.

177. *Broadcast Experience.* From June to December 1978, and from February to June 1980, Ms. Glenn was an account executive at Station KLIF(AM), Dallas, Texas. Prairie Ex. 2, pp. 2-3. From December 1978 until February 1980, she was national sales manager at Stations KATT AM/FM, Oklahoma City, Oklahoma. She did not supervise any staff. From January 1984 until August 1984, Ms. Glenn was an account executive at CSM, where she worked for her husband, who was then manager of CSM's Dallas office. Prairie Ex. 2, p. 3; Tr. 1084, 1095-1096.

Diversification

178. Neither Prairie nor Kimette Glenn has any ownership interest in any medium of mass communications, either existing or pending other than the application for a new FM station on Channel 227C2 at Haltom City, Texas. Prairie Ex. 1, pp. 1-2.

Auxiliary Power

179. Prairie will install auxiliary power sources at the station's transmitter and main studio. Prairie Ex. 3.

[32] Ms. Glenn paid $43,166.83 to or on behalf of Prairie and was reimbursed $9,929.39 for a total contribution of $33,237.44. Prairie Ex. 22.

Jonathan and Mary Lyn Wolfert, A General Partnership
Comparative Issue
Ownership Structure and Formation

180. Wolfert is a Texas general partnership consisting of "two equal general partners", Jonathan Wolfert and his wife, Mary Lyn Wolfert. Wolfert Ex. 1, p. 1.

181. Mr. Wolfert first learned of the Haltom City allocation from a JAM vice-president, Randy Bell. Tr. 1320. Mr. Wolfert contacted Wolfert's engineer, went to the FCC office in Dallas to pick up an FCC Form 301, and completed the application form. He met with Wolfert's original site owner to obtain a reasonable assurance of the availability of the site and wrote a letter to the landowner confirming the availability of that property. Tr. 1329-1330, 1421. When the new site was proposed, Mr. Wolfert did most of the work coordinating with the engineer. Tr. 1330. He was the primary person coordinating with Wolfert's engineer on FAA and EMI problems. Tr. 1331.

182. Mr. Wolfert prepared Wolfert's cost estimates and determined Wolfert was financially qualified by reviewing the personal financial statements of him and his wife. Prairie Ex. 16, pp. 2, 5. He coordinated publication of local notice of the filing of Wolfert's application and notice of the issuance of the Hearing Designation Order. Tr. 1330.

Integration

Jonathan Wolfert

183. Mr. Wolfert proposes to serve as station manager, working a minimum of 40 hours per week in that capacity. As such, he will participate in hiring and supervising station personnel and in developing station policies. His duties will include supervision and implementation of station policies, including all technical aspects of the station, with direct supervision of on-air staff and of program content. Wolfert Ex. 3, pp. 3-4. He will oversee all programming aspects of the station. Tr. 1334. He maintains that he will report to Mrs. Wolfert, who proposes to be the "top" manager, as the station's general manager. Tr. 1333, 1356, 1357.

184. Mr. Wolfert is currently president, director, treasurer, a director, and 50% shareholder of JAM Creative Productions, Inc. (JAM) and JAM Media Productions, Inc. (JAM Media). Mrs. Wolfert is a vice president, director and 50% shareholder of JAM and JAM Media. Wolfert Ex. 3, pp. 1, 4; Tr. 1332. JAM produces jingle packages and commercials for radio and television broadcast stations. Wolfert Ex. 3, p. 1. JAM Media markets an existing production library on compact discs to radio stations. *Id.* JAM has 15 employees and approximately 400 clients. JAM Media has no employees, but uses JAM sales personnel who are paid commissions on sales of the production libraries. *Id.*, pp. 1, 4; Tr. 1314.

185. Mr. Wolfert is the "top" manager at JAM, overseeing the entire JAM production. Tr. 1333, 1430. He oversees, hires, and fires employees in the creative area, the production staff, and the sales staff, and makes final decisions on which talent will work on particular jobs. Wolfert Ex. 3, p. 4. He writes, directs, mixes and produces spots, gives final approval on all sales orders, and conducts final review of most JAM bills. Tr. 1337, 1339, 1341-1342, 1430, 1436-1438. He meets with clients, sometimes travelling out-of-state to do so, and is personally responsible for about ten clients, including the British Broadcasting Company, a significant JAM client. He also deals nearly exclusively with the Voice of America, another important JAM client. Tr. 1321-1322.

186. Mr. Wolfert typically arrives at JAM's offices at 10:00 or 11:00 a.m., after a 20-minute drive from his home. He "frequently" works past midnight and he works on weekends. Wolfert Ex. 3, p. 4; Tr. 1334-1334, 1408, 1437. After working on JAM matters 50-55 hours per week at the JAM offices or studios, he devotes another two or three hours a week to JAM activities at home Tr. 1323-1324, 1408. Additionally, he devotes an average of four to five hours a month to JAM Media activities. Tr. 1323.

187. Mr. Wolfert does not plan to give up his ownership interests or his corporate positions in JAM or JAM Media if Wolfert is awarded the Haltom City construction permit. Tr. 1332. However, in his written testimony, Mr. Wolfert proposes that, upon assuming his duties as station manager of the radio station, he will "turn over his present duties to existing management-level employees" and will devote no more than 15 hours per week to JAM and JAM Media. Wolfert Ex. 3, p. 4. He will turn his clients over to other sales people, but will still maintain some client contact. Tr. 1435. He also will continue to do some creative work and to oversee the creative area for JAM, continue to oversee some production and continue to be involved, to some extent, in overseeing JAM's sales force, while he is working at the station. Tr. 1455. Mr. Wolfert's written testimony is that employees of JAM will be supervised either by the company's existing vice president for corporate development or its existing vice president in charge of creative direction. Wolfert Ex. 3, p. 5. He testified he hopes to shift supervision of production to other persons who would be able to field questions and offer advice. Tr. 1407.

188. At hearing, Mr. Wolfert testified that no person at JAM does all of the things he does, but that several do particular facets of it. He said there are existing employees at JAM who would be capable of performing his duties, but he did not identify them, other than to state that one current vice president, Chris Kirshaw, will "take on a little more responsibility" for supervising JAM production personnel. Tr. 1325-1326, 1413. Mr. Wolfert also did not state whether he has discussed with Mr. Kirshaw or other employees his plan for them to assume such additional duties.

189. Wolfert proposes to utilize two studios for its radio station. The first will be located in or near Haltom City, possibly co-located at Wolfert's proposed Haltom City transmitter site. Wolfert Ex. 3, p. 4; Tr. 1327-1328. The station's "auxiliary" studio and offices will be located at the JAM facilities in Dallas, about 35 miles, a 40-to-45 minute drive away from Wolfert's proposed transmitter site and from Haltom City. Wolfert Ex. 3, p. 4; Prairie Ex. 15; Tr. 1362. Two studios will be maintained because the JAM facility is not within the city grade contour of Wolfert's proposed station, and the Commission's rules require a licensee's "main" studio to be within that contour. Tr. 1349.

190. Mr. Wolfert will work at the JAM "auxiliary" studio, where all or most programming will originate, traffic will be done, and production will occur, and where the creative, air and production staffs will be located. Mr. Wolfert will have day-to-day supervisory authority over those employees. Tr. 1346-1348, 1355-1356, 1370. Mrs. Wolfert, as the station's general manager, will work during regular business hours, out of the "main" studio in Haltom City. Wolfert Ex. 3, p. 4; Tr. 1346, 1350. Mr. Wolfert plans

to visit the Haltom City "main" studio occasionally and his wife will sometimes visit the JAM "auxiliary" studio. Tr. 1415-1416.

191. Wolfert plans to construct and operate its proposed radio station from funds furnished by JAM, JAM Media and the Wolferts' personal funds. In addition, Wolfert plans to make substantial use of the studio and office facilities of JAM. Prairie Ex. 15; Ex. 16; Tr. 1396. JAM has two studios, one of which is currently used approximately eight hours per day to produce radio station jingle packages, from which Jam derives the majority of its income. Projects currently requiring use of JAM's second studio can be completed within about four hours per day by using the first JAM studio after the initial 8 hours are completed. Thus, according to Mr. Wolfert, JAM's second studio may be devoted exclusively to Wolfert's proposed radio station with no detrimental effect on JAM's functions. Prairie Ex. 16; Tr. 1397-1398.

192. As of November 8, 1991, Wolfert planned to utilize JAM employees for "on-air talent, production, programming and administrative support...." Prairie Ex. 16, p. 1. It will also use JAM employees for clerical support. *Id.*, Prairie Ex. 15; Tr. 1326, 1285. Through the third month of operations of Wolfert's proposed FM station all JAM staff performing services for the station will remain on JAM's payroll. Mr. and Mrs. Wolfert also will draw their salaries from JAM; they will not receive a salary from the station. JAM will not charge the station for the use of its facilities or its staff through the third month of operations. Prairie Ex. 15; Tr. 1357-1358, 1455. Thereafter, the services will be performed on a contract basis if Wolfert desires to continue the arrangement. Prairie Ex. 15; Tr. 1402.

193. JAM currently has six production people. Tr. 1337-1338. Its staff works approximately 9:00 a.m. to 6:00 p.m., although some recording engineers stay past six and editing often goes on until 8:00 or 9:00 p.m. Tr. 1338. JAM employees now work full-time 40 hours per week. Tr. 1339. In order to accommodate the staffing and operating proposal for Wolfert's station, JAM employees will have to work split shifts. Tr. 1398. Mr. and Mrs. Wolfert have not discussed the number of hours JAM employees will work once the station begins operation. Tr. 1433-1434. Three or four of JAM's five production personnel will possibly carry an air shift and do production work for JAM and the station. Tr. 1434. JAM's vice president Mark Holland, will perform on-air and production work for the station, as well as take over some of Mrs. Wolfert's oversight of JAM administrative personnel. Tr. 1324-1325. Mr. Wolfert testified that utilizing JAM staff for on-air radio work, even without part-time disc jockeys for the station, will not affect JAM's product flow. He contends that although the amount of JAM's business would not change, the proposed radio station operations would have no adverse impact on JAM's ability to continue its current volume of business. Prairie Ex. 16, p. 4; Tr. 1358, 1433.

194. Wolfert's initial staffing budget includes only one paid position ($2,550 for three months) for a receptionist/secretary. Prairie Ex. 14; Tr. 1357. Wolfert did not specifically budget for "disc jockeys," but only for "programming services" or "off-premises transmitter control," which could include non-JAM announcers, if necessary. Prairie Ex. 16, p. 3. Only two of the items in the remainder of the radio station's budget -- $2,000 for equipment rental and $900 for main studio rent -- are specifically for the "main" studio, although some part of the telephone and insurance costs will be attributable to the "main" studio operation. Tr. 1376.

195. About 35-40% of the station's administrative work will be done at the JAM "auxiliary" studio and JAM's receptionist will field any station calls. Tr. 1369, 1372, 1432. To the extent office and administrative functions are done by JAM employees, Mr. Wolfert will oversee them on a day-to-day basis, then report to Mrs. Wolfert who will supervise from the Haltom City "main" studio on a "management level" with "ultimate authority." Tr. 1356-1357, 1463-1464.

196. At the "main" studio, in addition to Mrs. Wolfert, sales people and a secretary/receptionist will be employed. The secretary will answer the telephone, type, do the bookkeeping, billing and accounting, log-in checks, send out bills, and, at least initially, gather local news and arrange for interviews with Haltom City residents. She will do 60-65% of the station's administrative work; the rest will be done by a JAM employee. Tr. 1350, 1354, 1367-1372. Wolfert's sales people, who will work strictly on commission, will be at the "main" studio. Tr. 1358, 1370.

197. Mr. Wolfert maintains that although he will be in the same physical facility as JAM and JAM Media, and those businesses will be his sole source of income, he will devote his time to the station. He will supervise JAM employees while they work for the station, as well as any disc jockeys which Wolfert may hire for the station. Tr. 1416, 1431.

198. Although the Haltom City "main" studio will have the ability to originate programming, most of the local programming which Wolfert plans to do will be from JAM's "auxiliary" studio. Tr. 1346. In its application, Wolfert proposed to cover local events but Mr. Wolfert is not sure whether any programming will originate from the Haltom City "main" studio. Prairie Ex. 13; Tr. 1346.

199. *Local Residence and Civic Activities.* Wolfert's proposal was amended to specify a new transmitter site after the "B" cut-off date for amendments as or right. Tr. 181, 1318. From September 1971 through July 1983 Mr. Wolfert resided within Wolfert's original and amended proposed service area. Since 1983, his residence has been within the amended, but not the original, proposed service area. Wolfert Ex. 3, p. 5; Tr. 182, 185.

200. Since August 1989, Mr. Wolfert has donated "several weekends" to recording a group of the area's local YMCA "Indian Princesses" at the JAM studios. Since 1985, he also has allowed area colleges with radio/television or audio production classes to visit JAM, and has personally conducted tours and answered questions. Wolfert Ex. 3, p. 5. The record does not reveal whether those activities were within the proposed service area, original or amended, or the amount of time devoted to such activities. *Id.* Mr. Wolfert testified that he does not know whether the JAM facility, which appears to be on Wolfert's proposed 1 mV/m contour line, is actually within Wolfert's proposed service area. Tr. 1390.

201. Mr. Wolfert has been an "active member" of his local PTA since August 1989 and, with his wife, has donated "numerous hours" for PTA projects. He has participated in fund collecting for various charities for approximately six years. Wolfert Ex. 3, p. 3. The record does not reflect the number of hours Mr. Wolfert devoted to such activities or whether they took place within the proposed service area.

202. *Broadcast Experience.* Mr. Wolfert received his radio telephone third class operator permit with broadcast endorsement on January 3, 1967. From September 1968 through August 1969, Mr. Wolfert worked at WALI (now WBAU), Adelphi University, Garden City, New York, performing engineering, production and announcing duties. From August 1969 through June 1971, he worked at WNTC, Potsdam, New York, as an announcer, production director (1969-1970) and program director (1970-1971). WNTC was a commercial carrier current AM radio station, which had FCC approval to feed an FM signal to the area cable system. Wolfert Ex. 3, p. 5.

203. From September 1969 through December 1969, Mr. Wolfert was employed at WYBG, Massena, New York, in production and as an announcer. Wolfert Ex. 3, pp. 5-6.

Mary Lyn Wolfert

204. Mrs. Wolfert proposes to serve full-time as general manager of the station, working a minimum of 40 hours per week in that capacity. Wolfert Ex. 3, p. 1. In her written testimony, Mrs. Wolfert states that she will hire and supervise department heads and be responsible for the development and determination of all station policies. She also proposes to be responsible for the administration and implementation of Wolfert's equal employment opportunity program and will oversee the recruitment, hiring, promotion and firing of all key station personnel. Her duties will also include supervision of all general, administrative and financial decisions affecting the proposed station and public service programming aired by the station. Wolfert Ex. 3, p. 1. Mrs. Wolfert and her husband discussed their relative positions prior to the application being filed.

205. Mrs. Wolfert will work at the Haltom City "main" studio where Wolfert will have its sales offices and secretarial/bookkeeping staff. Tr. 1427. She testified that she will oversee the sales staff and the secretary/bookkeeper while her husband will oversee all other station employees. Tr. 1465.

206. There may not be any news personnel at the Haltom City "main" studio because Wolfert may select a format which does not require generating news from that studio. Tr. 1352-1353. Thus, although Mrs. Wolfert's written direct case testimony states that she will hire and supervise department heads, her primary function will be to oversee a facility with no programming personnel. Tr. 1354-1355. She testified that billing for the station "will most likely" come to her. Tr. 1430.

207. Mrs. Wolfert testified that Wolfert will operate its station 24 hours a day, but does not know who will provide programming for an all-night operation or how to take care of the activities necessary to keep the station on the air 24 hours a day. However, she testified that her husband had assured her that it could be done. Tr. 1438-1440. Mrs. Wolfert has talked to Wolfert's FCC counsel about the application. Tr. 1331.

208. Currently, most of Mrs. Wolfert's time is spent in doing JAM's bookkeeping, ensuring that tax items are taken care of, and overseeing JAM's office personnel and production purchases. Tr. 1463. She will continue to oversee JAM bookkeeping, taxes and other financial areas by reviewing reports at home. Tr. 1455, 1462. The approximately 15 hours per week she now spends personally performing tasks for JAM, as opposed to "overseeing" JAM work, would be turned over to unnamed other JAM employees. Tr. 1477-1478.

209. In addition to his duties at JAM, JAM vice president Mark Holland will do on-air and production-related work at the Wolfert station and oversee some JAM administrative personnel, a task which currently is Mrs. Wolfert's primary responsibility. Tr. 1325. Unnamed other JAM employees could do the "Mundane" tasks Mrs. Wolfert currently performs for JAM, including trips to the bank, computer entries and reports to the accountant, Mrs. Wolfert testified. Tr. 1456, 1461. She proposes to appoint an existing JAM management-level employee to sign checks for the companies and will oversee that employee who, in turn, will assume direct responsibility for such duties. Wolfert Ex. 3, p. 2.

210. Mrs. Wolfert has worked at JAM since 1974. Tr. 1423. Currently, her hours are from approximately 9:00 a.m. until 3:00 p.m., Monday through Friday. Very little of her time is devoted to JAM Media, for which she pays bills and oversees bookkeeping. Wolfert Ex. 3, p. 2; Tr. 1316. Mrs. Wolfert currently oversees five office employees, bookkeeping, financial matters including taxes, and talent hired by JAM. Upon assuming her duties at Wolfert's proposed FM station, she will no longer oversee office employees or talent employed by JAM and proposes to reduce the time spent for both JAM and JAM Media "to the full extent necessary to devote a minimum of forty hours per week on a day-to-day basis to the management of Wolfert's proposed station." Wolfert Ex. 3, p. 2. She proposes to devote no more than ten hours per week to JAM and JAM Media. *Id.*

211. Mrs. Wolfert previously worked full-time at JAM, but once her seven-year-old daughter began elementary school, she reduced her hours to eliminate afternoon work in order to be at home with her daughter. Tr. 1316-1317, 1344, 1417. Mrs. Wolfert currently drops her daughter off at school at 8:15 a.m. and then drives approximately 15-20 minutes from the school to the JAM facility. Tr. 1426. She then picks her daughter up from school and brings her home. Tr. 1343-1344. In the past, she has not seriously considered "aftercare" child care, but maintains she would utilize such childcare in order to effectuate her integration proposal. She also will arrange for her daughter to take a bus to school and she or her husband would then pick up her daughter from aftercare. Tr. 1414, 1427-1429. The school is about 45 minutes from Haltom City. Tr. 1344.

212. *Local Residence and Civic Activities.* From July 1972 through July 1983, Mrs. Wolfert resided within the service area as set forth in Wolfert's original and amended proposals. Since July 1983, her residence has been within the amended, but not the original, proposed service area. Tr. 184-185.

213. Mrs. Wolfert has participated in civic activities in the proposed service area. Her written testimony is that she and her husband have donated "numerous hours" for PTA projects since August 1989 but the record does not include any number of hours. She has participated in fund collecting for "various charities" for approximately six years, and in 1991, she solicited donations for the National Kidney Foundation. Again, the record does not specify the number of hours or whether the activities were in the proposed service area, as originally proposed or as amended. Wolfert Ex. 3, p. 3; Tr. 1472.

214. *Broadcast Experience*. From August 1969 through August 1971, and again from January 1972 through June 1972, Mrs. Wolfert was a volunteer at AM carrier current station WNTC, working as traffic coordinator, secretary, and programming assistant. Wolfert Ex. 3, p. 3; Tr. 1473-1474.

Diversification

215. Neither Wolfert nor its principals have any ownership interest in or employment connection with, any media of mass communications. Wolfert Ex. 2.

Auxiliary Power

216. Wolfert proposes to install and utilize auxiliary power generating equipment. Wolfert Ex. 4, p. 1.

HISPANIC COALITION, INC.
Ownership and Formation

217. As of the time of the November 1991 hearing, Hispanic was a Texas corporation with the following shareholders, officers and directors:

Name	Percentage Voting Stock	Corporate Position
Marcos Rodriguez, Sr.	60%	President, Treasurer, Director
Alicia Esparza	20%	None
Dalia Boatright	20%	None

Hispanic Ex. 1, p. 1; Madalina Ex. 14; Ex. 16.

218. Mr. Rodriguez, Sr. died on February 15, 1992. On April 7, 1992, Hispanic filed a motion for leave to amend seeking to substitute Marcos Rodriguez, Jr., Trustee of the Marcos A. Rodriguez, Jr. Trust, for his deceased father, Marcos Rodriguez, Sr., as Hispanic's president, sole director, 60% shareholder, and the proposed general manager of its station. The amendment was accepted subject to the condition that its integration credit be limited to the maximum integration credit it could have received for its proposal to integrate Mr. Rodriguez, Sr., had he lived. *Memorandum Opinion and Order*, FCC 92M-489 (April 23, 1992).

219. Alicia Esparza and Marcos Rodriguez, Sr. first learned about the availability of the Haltom City allocation from a memorandum sent to clients and station managers by the law firm of Cohn & Marks. Tr. 1507. Mr. Rodriguez, Sr. contacted Ms. Esparza, who was then working as general manager of KSSA AM/FM, stations owned by Mr. Rodriguez, Sr., and asked her to join with him on an application for Haltom City. Tr. 1507-1508.

220. Ms. Esparza and Mr. Rodriguez, Sr. initially planned to form a general partnership, with Mr. Rodriguez, Sr. holding 90% of the equity and Ms. Esparza holding 10%. Tr. 1488-1489. A partnership proposal was drafted for the applicant and sent to it at the offices of KSSA AM/FM. tr. 1489-1491. However, the parties never finalized the partnership agreement because they learned that a foreign national cannot be a partner in an FCC licensee. Ms. Esparza, at that time, was a citizen of Mexico. Tr. 1491. Thus, a corporation was established instead in September 1989. See Madalina Ex. 11. Ms. Boatright became a stockholder at the time of the "B" cutoff in January 1990. Tr. 1615-1616; 1731-1733.

Integration

Marcos A. Rodriguez, Sr.

221. Mr. Rodriguez, Sr. proposed to give up any employment he might have to work full time, on a daily basis, as the station's general manager, with overall supervisory responsibility for the operation and management of the station. He, along with Ms. Esparza, planned to establish station policy and have authority in the hiring and firing and supervision of station employees, except for the sales department. Ms. Esparza would be dealing more directly with "hands-on" management; Mr. Rodriguez, Sr. planned to oversee Ms. Esparza, "in the manner of a general manager over a station manager." Hispanic Ex. 4, pp. 1-2. Tr. 1645-1647. Mr. Rodriguez, Sr. testified that he would supervise Ms. Esparza at the Haltom City station "and do a lot of the things that a president of an organization does." Tr. 1647.

222. Mr. Rodriguez, Sr. was 64 years old at the time of the November 1991 hearing. Tr. 1659. In 1983 he had heart disease and by-pass surgery. *Id.* In 1986, he filed an application for transfer of control of the KESS(FM) licensee to his son, Marcos Rodriguez, Jr., representing to the FCC that he had "attained retirement age and is desirous of taking a less active part in the management of" the licensee's affairs.[33] Poder Ex. 23. Mr. Rodriguez, Sr. had been owner and general manager of Radio Station KESS-FM in Fort Worth (previously KBUY-FM) from 1976-1986. However, after turning over the reins to his son, Mr. Rodriguez, Sr. changed his mind about retiring. He stated he "realized it was a bad idea for me because I felt miserable without nothing to do." Tr. 1655.

223. In 1987, Mr. Rodriguez, Sr. purchased KSSA AM/FM.[34] He testified that he initially worked as general manager and president of those stations, and changed the AM station's format to Spanish language. Tr. 1656. He employed Ms. Esparza as operations director and then, in March 1989, promoted her to the general manager position. As general manager, Mr. Esparza supervised every aspect of the station's operations for over two years. Hispanic Ex. 2, p. 3; Tr. 1555-1556.

224. In July 1987, Mr. Rodriguez, Sr. had a stroke which required him to be hospitalized for about 20 days. Tr. 1658. For the next three months Mr. Rodriguez, Sr. did not come into the office at all. Tr. 1598. Again in February 1989, Mr. Rodriguez, Sr. was absent for some periods of time because his wife was ill. During the time Mr. Rodriguez, Sr. did not work a full forty hour week, he called Ms. Esparza at the radio station on a daily basis. Tr. 1590. Outside of the periods discussed, according to Ms. Esparza, Mr. Rodriguez, Sr. was usually at station KSSA AM/FM most of the time on a daily basis, Monday through

[33] Rodriguez, Sr. transfered all of his voting stock to his son and retained all of his non voting stock. Poder Ex. 23, p. 1.

[34] From 1987-June 1990, Mr. Mr. Rodriguez, Sr. was President of Radio Plano, Inc. and Trustee of the Elisha Trust, Owner of KSSA-AM, Cockrell Hill, Texas and KSSA-FM, McKinney, Texas.

Friday. Tr. 1590-1591. In June 1990, Mr. Rodriguez, Sr. turned over the presidency of KSSA AM/FM to his son, Antonio. Tr. 1558-1559.

225. At the time of his stroke in 1987, the therapist advised Mr. Rodriguez, Sr. that he would not be able to walk or use his right hand. However, as of the November 1991 hearing, he had regained some use of his right hand and legs. While before the stroke, Mr. Rodriguez, Sr. signed documents with his right hand, he now signed with his left hand. Tr. 1658-1659. Also, Mr. Rodriguez, Sr. walks with a cane. According to him, he could have walked without a cane and only used a cane for long walks. Tr. 1661. In December 1990, Mr. Rodriguez, Sr. began working as an unpaid, part-time assistant to the general manager of KESS-AM, working on promotional events. Tr. 1685-1686. Mr. Rodriguez, Sr. stated he worked on a reduced schedule at KESS-AM because he was unpaid and had other things to do, not because of his health. Tr. 1660. Also, the job was only temporary until the Haltom City case was decided. Tr. 1656. Mr. Rodriguez testified he did not have to work for a living and could do as he pleased. Tr. 1660. He testified that his finances were such that he did not need any salary but said he would receive one if Hispanic obtained the Haltom City construction permit because moving to Haltom City would create "expenses" and be "uncomfortable." Tr. 1667.

226. *Minority.* Mr. Rodriguez, Sr. was Hispanic. Hispanic Ex. 4, p. 1.

227. *Local Residence and Civic Activities.* Mr. Rodriguez, Sr. resided within Hispanic's 1 mV/m service area from 1965 to 1987. Hispanic Ex. 4, Hispanic Ex. 4-R. Since 1987, he resided outside the service area. He planned to relocate to Haltom City. Hispanic Ex. 4, pp. 1-2, Ex. 4-R; Tr. 1605.

228. Mr. Rodriguez took part in the following civic activities:

(a) Sociedad Interamericana. Founder and Director (1971 - 1976) of this Dallas-headquartered association to promote culture and arts from Latin American countries.

(b) Mundo Cultural Hispano. On the advisory board, 1987-1988, of this Dallas cultural organization that promotes arts in Mexico and Latin American countries. Tr. 1621.

(c) Operacion Juguete. Founder of "Toys and Tots," which raises funds every Christmas for underprivileged children in the Dallas - Ft. Worth area. From 1977 to 1986, he did work for this organization at Station KLTY-FM. He ceased working for the group for 2-3 years and had become involved again as of the hearing. Tr. 1621-1623. His participation included on-air promotions and fundraising. Tr. 1698.

(d) Cruz Roja (Red Cross). Member of Task Force for Mexico's earthquake victims (Sept. 1985), raising money for victims. 72 hours on the air.

(e) Federation of Mexican Organizations. From 1981 to 1985, he helped develop and organize the "16th of September" parade and festival for this group which met in Dallas. Tr. 1623.

(f) Bicentennial Committee of Fort Worth. During one year a "few years" before the November 1991 hearing, he coordinated the celebration among the Hispanic community. Tr. 1625.

(g) South Side (Fort Worth) Little League. Member, 1980 - 1985, of this group which developed a children's sports facility.

(h) United Way of Metropolitan Dallas. In 1976-1986, he participated, through his radio station, in the fundraising campaign, airing announcements. He did not recall whether he had ever attended a meeting. Tr. 1632.

(i) Network of Hispanic Communicators. During an unspecified time, for "many years" he helped with and supported an essay contest for minorities, by allowing some members to use the facilities of KESS, and by airing announcements for the contest. He may have attended some meetings. Tr. 1625-1626, 1634.

(j) Jerry Lewis Telethon. 1976-1990, he promoted the participation of Hispanics in helping raise funds for the telethon. The promotions were aired on KESS in 1976. From 1976-1986, they were aired from KLTY's Dallas studio. From 1986-1990, the promotional spots aired from the Dallas studios of KSSA. Tr. 1626-1628.

(k) Dallas Mexican (Hispanic) Chamber of Commerce. Board member one year; member for several years in the late 1980s-early 1980s, which develops and promotes Hispanic business. Tr. 1628.

(l) Dallas Southwest Voters Registration. During the late 1970s-mid 1970s, he helped with and developed, a campaign urging Hispanics to register to vote, using his station for voter registration.

(m) La Fabulosa Community Project. From 1978 to the mid-1980s, he was the founder of this nonprofit organization created to help underprivileged people with the social and economic problems. Meetings were at KESS studios in Ft. Worth and the station was involved. Tr. 1633, 1699.

See Hispanic Ex. 4, pp. 2-3. The record does not reflect the amount of time Mr. Rodriguez, Sr. devoted to each activity. Mr. Rodriguez, Sr. testified at deposition in September 1991, when asked about the time he then currently spent on civic activities, "right now, very little." Tr. 1697. He said at deposition that he did not actively participate in any civic activity except Operation Juquete and the Fort Worth Civic League Association. Tr. 1697-1698. Dallas is not within Hispanic's proposed service area; Ft. Worth is. Tr. 1525, 1533.

229. *Broadcast Experience.* Mr. Rodriguez, Sr. had the following broadcast positions:

(a) December 1964-1968. Announcer and salesman at Radio Station KBUY (now KLTY-FM) in Ft. Worth.

(b) 1968 - 1970. Sales manager of Radio Station KBUY in Ft. Worth.

(c) 1970 - 1976. General manager of Radio Station KBUY in Ft. Worth.

(d) 1976 - 1986. Owner and general manager of Radio Station KESS-FM in Ft. Worth (previously KBUY-FM).

(e) 1987 - June 1990. President of Radio Plano, Inc. and Trustee of Elesha Trust, Owner of KSSA AM/FM.

(f) Dec. 1990 - Nov. 1991. Part-time honorary position as assistant to General Manager, KESS(AM), Ft. Worth. In 1991 Mr. Rodriguez, Sr. did not work full-time at KESS; his hours varied each week. His primary role was to acquire talent for festivals. Tr. 2608-2609.

See Hispanic Ex. No. 4, p. 4; Tr. 1618.

Marcos Rodriguez, Jr.

230. Marcos Rodriguez, Jr. is now president, sole director and 60 percent voting shareholder of Hispanic, as the trustee/beneficiary of the Marcos A. Rodriguez, Jr. Trust. He proposes to participate full time (no less than 40 hours per week) on a daily basis as the station's general manager, with overall supervisory responsibility for the operation and management of the station. He, along with Ms. Esparza, will establish station policy and have authority in the hiring, firing and supervision of station employees, except for the sales department. He testified that Ms. Esparza "will be dealing more directly with hands-on management" and he will oversee Ms. Esparza, "in the manner of a general manager over a station manager." Hispanic Ex. 13, p. 2. Mr. Rodriguez, Jr. testified that the general manager role would be more of "a visionary and an idea person," dealing with more sophisticated aspects such as analysis of the competition. Tr. 2539-2540. He pledges to terminate his current employment to integrate at Hispanic's station. Hispanic Ex. 13, p. 3.

231. As of April 1992, when Hispanic filed its amendment seeking to substitute Mr. Rodriguez, Jr. for his father, Marcos Rodriguez, Jr. was an individual applicant for an FM station at Gainesville, Texas. Mr. Rodriguez had committed to integrate part time (20 hours per week) as the station's general manager. However, on April 7, 1992, Mr. Rodriguez amended his application in the Gainesville proceeding to reflect the fact that, if the Haltom City application is granted, he would not be integrated in the Gainesville station. In its Order approving a settlement between Rodriguez and Kevin Potter, the other applicant in the Gainesville proceeding, the Commission relieved Rodriguez of his nullified integration proposal. See *Kevin Potter, et. al.* MM Dkt. No. 90-290, FCC 92I-065, released July 20, 1992. Consideration of Rodriguez' prior commitment to integrate part time in Gainesville is, therefore, moot.[35]

232. *Minority.* Mr. Rodriguez, Jr. is a Hispanic. Hispanic Ex. 13, p. 3.

233. *Local Residence and Civic Activities.* Mr. Rodriguez, Jr. resided within Hispanic's 1 mV/m service area from 1965 to July 1986 and from February 1991 through the present. Hispanic Ex. 13, pp. 1-2. He proposes to relocate to Haltom City if Hispanic receives the construction permit. *Id.*, p. 3.

234. Mr. Rodriguez, Jr. claims credit for the following civic activities with organizations:

(a) 1985 to 1986. Board Member of "Because We Care," Fort Worth. This organization educated students about the dangers of substance abuse. Mr. Rodriguez, Jr.'s efforts were directed to the middle school level.

(b) 1988 to 1991. Officer and Board Member of Dallas Concilio of Hispanic Service Organizations, Dallas, an organization primarily funded by United Way. He worked on developing master strategies and goals and on committees which sought to meet Hispanic needs in the proposed service area.

(c) 1989 to 1991. Corporate advisory board member of the Dallas Hispanic Chamber of Commerce; member of its board of directors in 1990.

(d) 1989 to 1991. Board member of Anita N. Martinez Ballet Folkorico, Inc., Dallas/Fort Worth area, which promotes ballet as a cultural activity. He served one year as chairman of the organization's annual Gala.

Hispanic Ex. 13, pp. 2-3.

235. *Broadcast Experience.* Because Hispanic did not seek credit for broadcast experience in its amendment setting forth the integration proposal of Mr. Rodriguez, Jr., no credit is to be given for any broadcast experience. Tr. 2455.

Alicia Esparza

236. Ms. Esparza proposes to serve as the station's full-time operations director, a position equated with that of a station manager. She will be involved in overseeing the day-to-day operations of the station and, with Mr. Rodriguez, will help establish station policies. With the exception of Ms. Boatright's authority in the sales department, she will have authority to hire, fire and supervise station employees. Hispanic Ex. 2, p. 1. Ms. Esparza pledged to leave her present job in the event the Hispanic application is granted. *Id.*

237. *Minority.* Ms. Esparza is an Hispanic woman. Hispanic Ex. 2, p. 1.

238. *Local Residence and Civic Activities.* Ms. Esparza resided within the service area of Hispanic's proposed station from July 1983 to November 1984 and from February 1987 to the present. She will relocate to Haltom City if Hispanic's application is granted. Hispanic Ex. 2, pp. 1-2.

239. Ms. Esparza has been involved in the following civic activities:

[35] Before the Commission relieved him of his prior integration commitment at Gainesville, Mr. Rodriguez, Jr. outlined in this record the manner in which that part-time integration could be accommodated with his full-time (40 hours per week) integration commitment to Haltom City. He would travel the 50 nautical miles to Gainesville (a one hour drive) on Thursdays or Mondays or Fridays and establish a nonexclusive, part-time residence there. Tr. 2518, 2519, 2529-2531. The trip may be made on weekends. Tr. 2530. Overnight would likely be Thursday night or weekends. Tr. 2531. He would be general manager and would supervise the sales manager/operations director who would be in charge of sales and a lot of the day-to-day administration. Tr. 2536. A program director/administrator would be in charge of programming the Gainesville station. A bookkeeper/traffic continuity person would handle books and logs. Tr. 2426-2427. Part-time employees would fill in at the station. Tr. 2527.

(a) 1981-1983. Member of Advisory Board of KNBN-TV 33, an Hispanic community mediator, advising station owners on Hispanic community needs in the service area. Ms. Esparza was employed by KNBN as a secretary during the time she was on the advisory board. Tr. 1584.

(b) 1983-1989. Member of Mundo Cultural Hispano, helping to coordinate events to promote the Hispanic arts and culture. The organization's headquarters are located in Dallas. Some of the work she did was from her home, which was located outside Hispanic's service area during part of 1983, until July 1983, and again from December 1984 to February 1987. She also performed some duties from her office, which was located outside the service area from December 1984 to August 1986. Tr. 1527-1530.

(c) 1983-1989. Member of Association Cultural America Latina, promoting the arts and culture of Hispanics. She worked as a volunteer from the group's offices in Dallas. Tr. 1530.

(d) 1985. One of three coordinators of Red Cross Task Force to help the Mexican earthquake victims, operating out of the Dallas office. Tr. 1531.

(e) 1986-1989. For several festivals she was one of three coordinators for the "16th of September Parade," through the Federacio de Organizaciones Mexicans, responsible for all aspects, from the parade through the festival, for this event for the Mexican/American community in Dallas. The parade was held in Dallas. Some meetings were held in Dallas, some in Fort Worth. Tr. 1531-1533. During that entire time, some of the activities were connected to KSSA. Tr. 1585, 1588.

(f) 1989. One of three coordinators of "Back to School Celebration," a Dallas education fair to encourage Hispanic youngsters to stay in school and to develop a fund for scholarships. Tr. 1534. It was a promotional activity connected with KSSA, the station at which Ms. Esparza was then employed. Tr. 1585.

(g) 1990-Present. Member, Board of Directors of the Dallas Art District Friends, promoting cultural activities for minorities. The group is headquartered in Dallas and has its meetings there. Tr. 1535.

(h) 1990-Present. Member of the new members committee of Amigos De La Cultura Mexicana, an organization created by the Mexican Consulate to promote Mexican arts in this country. The organization is located in Dallas and holds its meetings there. Tr. 1535-1536.

See Hispanic Ex. 2, pp. 2-3. The record does not reflect the amount of time Ms. Esparza devoted to civic activities.

240. *Broadcast Experience*. Ms. Esparza has had the following full-time broadcast positions:

(a) KUVN-TV, Garland, TX. From February 16, 1991, to July 1991, employed as regional commercial sales manager, in Ft. Worth. Employed as local sales manager in Dallas office since July 1991.

(b) KSSA AM/FM. Employed as general manager, supervising all departments, March 1989 to February 15, 1991.

(c) KSSA AM/FM. Employed as operations director, with control of programming, traffic and promotions, from July 1987 to March 1989.

(d) KSSA(FM), Ft. Worth. Employed as an account executive, August 11, 1986 to June 1987.

(e) KSSA. Assistant to general manager from May 1983 to August 10, 1986.

(f) KNBN-TV 33. Clerical secretary to the general manager; host of daily public service program, coordinating and developing public service programs with interviews with different organizations and government agencies. February 1981 to October 1983.

Hispanic Ex. 2, pp. 3-4; Tr. 1586.

Dalia Boatright

241. Ms. Boatright proposes to serve as the station's full-time general sales manager, with policy authority in overseeing sales operations and staff on a daily basis. She will have authority in the hiring, firing and supervision of the sales staff. Hispanic Ex. 3, p. 1. Ms. Boatright will terminate her current employment to integrate at the station.

242. *Minority*. Ms. Boatright is an Hispanic woman. *Id.*

243. *Local Residence and Civic Activities*. Ms. Boatright was a resident of Hispanic's proposed service area from 1972 to September 1990. Since September 1990, she has resided outside the service area. Hispanic Ex. 3, p. 1; Ex. 33-5. She proposes to move to Haltom City should Hispanic's application be granted. *Id.*

244. Ms. Boatright's civic activities in the service area are as follows:

(a) 1976-1978. Barrios Unidos (government funded center for job placement of Hispanic students). Ms. Boatright attended meetings and informed listeners on jobs available.

(b) 1976-1978. Cassetta Learning Center (English classes for Hispanics who do not know how to read or write English). Ms. Boatright attended meetings and informed listeners about free classes available to them.

(c) 1978-1980. All Saints Catholic Church (provides clothes, food, shelter to the needy). Ms. Boatright helped the church organize and publicize fundraising events for needy people, serving on a committee.

(d) 1987-1988. Fort Worth Hispanic Soccer Team. Ms. Boatright attended meetings, organized an event to raise money for uniforms, helped to get sponsors, and encouraged minority youngsters to participate in sports.

(e) 1987-Present. National Hispanic Scholarship Fund (helps organize events to raise money for scholarship funds, mostly through concert events in Dallas and Fort Worth). Ms. Boatright has been in charge of publicity.

(f) 1987-1989. Alcoholics Anonymous. Ms. Boatright arranged for guest speakers to appear on talk shows to discuss their organization and ventilate problems associated with alcoholism, and provided assistance to those suffering from this disease.

(g) 1987-Present. Fort Worth Hispanic Chamber of Commerce. Attended meetings and participated in activities representing radio station employers KFJZ and KSSA.

(h) 1989-Present. Caridades Catolicas (provides legal assistance primarily to Mexican immigrants seeking U.S. citizenship.) Ms. Boatright "assists" in this organization.

Hispanic Ex. 3, pp. 1-2.

245. *Broadcast Experience.* Ms. Boatright has held the following full-time broadcast positions:

(a) KBUY-FM (later KESS), Fort Worth, Texas. Employed as receptionist (1976-1977); traffic director (1977-1988); public service director (1978-1980); public service director/weekend disc jockey (1980-1985); program director (1985-1987).

(b) KFJZ-AM, Fort Worth, Texas. Served as general manager and sales manager, 1987-1989.

(c) KSSA-AM, Plano/Cockrell Hill, Texas. Employed as national sales manager from 1989 to March 1990; has been an account executive since March 1990.

Hispanic Ex. 3, pp. 2-3; Tr. 1727-1728.

Diversification

246. In Hispanic's application Mr. Rodriguez, Sr. proposed to divest his interest in Radio Plano, Inc., licensee of KSSA AM/FM. Tr. 1678. An application for transfer of control to his son, Antonio Rodriguez, as trustee, was granted in February 1990. *Id.* Mr. Rodriguez, Sr. testified he believes the transfer was consummated in June or July 1990. Tr. 1678-1679.

247. As of the hearing, Mr. Rodriguez, Sr., held nonvoting preferred stock in the licensee of KLTY-FM, Ft. Worth, Texas. He pledged to divest himself of all outside broadcast interests if Hispanic's application is granted. Hispanic Ex. 1. Neither Ms. Esparza nor Ms. Boatright have other media interests. *Id.*

248. Mr. Rodriguez, Jr. is president, director, and 100% voting common stockholder of the licensees of KESS(AM) and KLTY-FM, Fort Worth, Texas. Mr. Rodriguez has pledged to divest his media interests and all other employment in the event of a grant to Hispanic "arising out of consideration of its comparative merits in this comparative proceeding." Mr. Rodriguez' divestiture statement, containing this language, reads as follows:

"In order to comply with the Federal Communications Commission's current policies with respect to diversity and employment in outside ventures and in order to avoid being a negative factor or bringing a demerit to Hispanic Coalition, Inc. in the comparative decisional process, given those policies in their present reach and interpretation, Marcos A. Rodriguez, Jr. as general manager commits to divest of all other attributable media interests and all other employment prior to Hispanic Coalition, Inc. inaugurating operations on the Haltom FM station in the event of a grant to Hispanic Coalition, Inc. arising out of consideration of its comparative merits in this comparative proceeding.

Should Hispanic Coalition, Inc. be awarded the construction permit on any other basis than comparative, Marcos A. Rodriguez, Jr. will follow through on his financing commitment herein, selling one of more broadcast stations if deemed necessary to do so.

Hispanic Ex. 13, pp. 3-4; Prairie Ex. 25.

Auxiliary Power

249. Hispanic proposes to utilize auxiliary power generators. Hispanic Ex. 1.

O'Day Broadcasting, Ltd. (O'Day)
Financial Certification Issue

250. O'Day is a limited partnership comprised of Anna O'Day, the sole general partner, and Craig Siebert and Joan Leanos, the two limited partners. O'Day initially relied upon a financing letter from the investment banking firm of Blount, Parrish and Roton (BP&R) and now relies on a letter from another investment company, Concourse Capital Corporation (CCC).

251. Anna O'Day estimated the costs to construct and operate O'Day's station from reviewing a form estimate O'Day's FCC counsel had provided to her, referring to the budget of the licensee she was then working for, talking to broadcast industry friends and O'Day's engineer, and obtaining an estimate of the costs to acquire sufficient land for the O'Day tower. O'Day Ex. 10, p. 1. She estimated O'Day would need a total of $519,432, including $129,112 in construction costs; $101,085 in operating costs for three months; and $289,235 in "other" costs, including promotions and programming. O'Day Ex. 10, p. 2. Tr. 2105.

252. On September 8, 1989, a meeting was held between all the O'Day principals, and its FCC attorneys, Jeffrey Craven and Tom Siebert (Craig Siebert's brother) at the law firm of Besozzi & Gavin. At the September 8, 1989 meeting, Joan Leanos recommended that Ms. O'Day contact her cousin, Jeffrey Alexopulos, then a principal and managing director of the investment banking firm of BP&R, to obtain a financing letter. O'Day Ex. 10, p. 2; Ex. 11, p. 1; Ex. 12, p. 1. Ms. Leanos had recommended Mr. Alexopulos because he and BP&R had issued a letter to an applicant for a new FM station at Valley Station, Kentucky, in which Ms. Leanos was a partner with Craig Siebert. In obtaining that Valley Station letter, Ms. Leanos had received a loan letter from BP&R, as well as a May 3, 1989 letter stating that BP&R had a pre-approved line of credit of $7,500,000 from AmSouth Bank, N.A., and the ability to access additional funds upon twenty-four hours notice. O'Day Ex. 11, pp. 1-2 and Attachments A & B; Ex. 12, p. 1.

253. Ms. Leanos called Mr. Alexopulos to inform him that she was involved with Ms. O'Day and Mr. Siebert in pursuit of a new radio station and that he might receive a call form Ms. O'Day. O'Day Ex. 11, p. 1; Ex. 12, p. 1. O'Day testified she tried to obtain a loan letter from her

personal bank but was unsuccessful,[36] and called Mr. Alexopulos for a financing letter. At the time she called him she did not know Alexopulos was Leanos' cousin and had not previously had dealings with him or BP&R. Tr. 2108-2109. O'Day Ex. 10, p. 2; Ex. 12, p. 2.

254. Mr. Alexopulos recalls receiving a telephone call from Ms. O'Day in September 1989. Ms. O'Day provided information about the application, its principals, the Commission's process, the applicant's financial needs, the Commission's requirement for a loan commitment letter and asked Alexopulos whether his firm would be interested in providing the necessary financing. Tr. 1975-1976. Alexopulos responded that he needed more information. Tr. 1976. Mr. Alexopulos told Ms. O'Day to provide him with "information on the basis for the financing required, the net worth of the owners, information on her background" and an indication of where and to whom the letter should be sent. O'Day Ex. 12, p. 1.

255. On September 20, 1989, Ms. O'Day sent Mr. Alexopulos a seven page fax containing (a) the financial statement of Joan E. Leanos dated September 15, 1989, (b) the statement of net worth for Craig L. Siebert dated February 1, 1989, (c) a two-page letter describing Ms. O'Day's radio experience and stating that it would cost approximately $500,000 to construct the Haltom City station and operate it for 3 months with no income; O'Day Ex. 16.

256. Mr. Alexopulos was familiar with the process of providing these financing letters since he had provided one to an entity which Leanos and Siebert filed in Valley Station, Kentucky. O'Day Ex. 12, p. 1-2. He examined the financial statements of the principals involved and reviewed O'Day's resume and the basic business plan, which Ms. O'Day had provided, before issuing an initial financial commitment letter for $600,000. Tr. 1976. This information was sufficient, in Mr. Alexopulos' view to issue the financing letter. Tr. 2041.

257. The financing letter from BP&R, under the signature of Mr. Alexopulos, dated September 20, 1989, states, in part, that the purpose of the letter is to advise that "subject to the qualifications stated below, BP&R is willing to underwrite a taxable debt financing of up to $600,000 to cover equipment costs and working capital requirements." The letter is contingent upon certain conditions being met, including a grant of the construction permit, and that "all reasonable and ordinary credit criteria of BP&R are met at such time as you (a) receive the construction permit; (b) request a formal investment banking commitment [from] BP&R and (c) execute all customary documentation normally required by BP&R." O'Day Ex. 10, Attachment A. The letter further provides "we have reviewed relevant financial statements regarding the funding of the proposed station and are satisfied with them." It provides that the loan would be collateralized with station assets. *Id.* The O'Day letter is nearly identical to the BP&R letter provided to the Valley Station applicant, except that the Valley Station letter says BP&R is "willing to finance you," language not included in Haltom City letter. *See* O'Day Ex. 10, Attachment A and Ex. 11, Attachment B. However, Mr. Alexopulos testified the same basic mechanism was contemplated for both proposals. *Id.;* Tr. 2026-2029.

258. In Mr. Alexopulos' mind the letter meant Blount, Parish was prepared to provide the financing it promised to O'Day, whether or not BP&R had investors lined up. Tr. 2040. He planned to finance it with a straight debt instrument, secured by the assets of O'Day Broadcasting and its principals. Tr. 1982. Alexopulos did not plan to offer conversion rights to acquire the equity of O'Day. Tr. 1093. At the time he issued the letter to O'Day, he had several investors in mind to cover the $600,000, and before issuing the letter, he canvassed potential investors to see who was interested. Tr. 2030-2032. Alexopulos stated that he had available a base of investors, individual and institutional, who would readily participate in the financing of this venture in amounts of $600,000 to $1,000,000. Tr. 1982-1983.

259. On July 1, 1991, Ms. O'Day learned that the property specified as O'Day's tower site had been sold to Mr. Vongsavath, who was willing to provide O'Day with continued reasonable assurance of the property, subject to the price increasing from an estimated $110,000 to $250,000. O'Day Ex. 10, p. 4. The increase in the price of the property exceeded O'Day's budget and its letter of reasonable assurance. After receiving written confirmation of the availability of the property for that price, Ms. O'Day first spoke with counsel and then proceeded to contact BP&R to obtain a new letter. O'Day Ex. 10, p. 4. When she did so, she learned that Mr. Alexopulos had left BP&R and started his own investment banking firm, CCC, in Atlanta, Georgia. *Id.* Ms. O'Day had not communicated with Alexopulos about the letter between September 1989 and the summer of 1991, and Alexopulos had not advised her he left BP&R. Tr. 2036-2037, 2157. Mr. Alexopulos had left BP&R in December 1989, had gone out on his own for nearly a year and then purchased CCC in Fall 1990. Tr. 1985, 1987, 2006, 2020-2021. Ms. O'Day testified she decided to call Mr. Alexopulos rather than seek a new letter from BP&R because all of her contacts had been with Mr. Alexopulos and she felt she had established a rapport with him. O'Day Ex. 10, p. 4; Tr. 2158-2159, 2164-2165.

260. CCC is a brokerage firm, providing investment banking services to clients, Concourse Capital Assets Management (CCAM) is a registered investment advisor that served in that capacity for the mutual fund, Concourse Funds, Inc. Alexopulos and Tony Negus were 50-50 partners in the two ventures, with Alexopulos serving as president of the CCAM and Negus was president of CCC. Tr. 1987.

261. Ms. O'Day reached Mr. Alexopulos and requested that he issue a new financing letter in the amount of $900,000 to cover increased costs associated with acquisition of the property for the tower, which had been sold to Mr. Vongsavath. O'Day Ex. 7, p. 4. On September 9, 1991, Mr. Alexopulos drafted a letter to Ms. O'Day from CCC, which he and his partner, Tony Negus owned and operated, along with CCAM. Tr. 1986. The source of funds through which Alexopulos was able to provide the required underwriting was the Concourse Funds Inc. Growth and Income Portfolio, (the Fund), an open-ended mutual fund, which had in excess of $7,000,000 in net assets as of the date upon which the CC Corp. letter was issued. O'Day Ex. 12, p. 4. In addition, the radio station's underwriting was within the Funds' investment objectives. *Id.*

[36] Ms. O'Day's personal bank advised her they would need at least 30 days to consider such a request. O'Day Ex. 10, p. 2.

262. Before issuing that letter, he received updated financial statements from Leanos and Siebert, though such further documentation was not necessary in his mind. O'Day Ex. 12, p. 3; Tr. 2010. The letter was identical in substance to the one issued by BP&R except for the amount of funds. On September 12, 1991, O'Day amended its application to demonstrate that it had the requisite financing to cover the increased cost of building its station.

263. As a result of corporate restructuring at the end of December, 1991, Alexopulos is no longer involved in CCC, but continues to be the 100% owner of CCAM and continues to have a relationship with Concourse Funds, Inc. Tr. 1990. Mr. Alexopulos believes that if O'Day is successful and approaches CCC, CCC will honor the commitment and provide the financing. Tr. 2036. Alexopulos is also now a managing director in corporate finance at Argent Securities. Tr. 1989. Now that Alexopulos is no longer with CCC, he will either work to facilitate CCC's commitment to O'Day or bring O'Day to Argent Securities. Tr. 1997. Ms. O'Day testified O'Day is still relying on the CCC letter. Tr. 2164.

Comparative Issue
Ownership and Formation

264. O'Day is a Texas limited partnership comprised of Anna O'Day as the sole general partner owning 15% of O'Day's equity, Craig L. Siebert as a limited partner with 75% of the partnership's equity, and Joan E. Leanos as a limited partner holding 10% of the equity. O'Day Ex. 1, p. 1.

265. Craig Siebert, a Certified Public Accountant (CPA) residing in Annapolis, Maryland (Tr. 1918), first heard of the Haltom City allocation from attorney Jeff Craven with the law firm of Besozzi & Gavin. Tr. 1932, 2061. Craig Siebert's brother, Tom Siebert, is affiliated with the Besozzi law firm. Tr. 1921.

266. Craig Siebert contacted Ms. Leanos, also a Maryland resident and a CPA, as well as his former employee, to discuss the possibility of applying for the Haltom City allocation. Tr. 2051-2052, 2061. Ms. Leanos was then the sole (15%) general partner in a limited partnership with Craig Siebert for a station in Valley Station, Kentucky, and she planned to integrate at the Valley Station facility. Tr. 1924, 1933, 1953, 2054-2055, 2058. Siebert and Leanos decided the Haltom City applicant would be a limited partnership, but Ms. Leanos ruled herself out as the general partner because she did not want to move to Dallas to work at the Haltom City station. Tr. 2062-2063. They decided to find a general partner, preferably a local minority female in deference to FCC comparative criteria, to take 15-20% of the equity. Tr. 2063-2064.

267. Ms. Leanos volunteered to travel to Dallas to find a general partner. Tr. 1933-1934. She had a client in Maryland who had a sister, Cindy Murrah, who lived in Dallas and was employed selling television advertising. Tr. 2065-2066, 2094. Ms. Leanos arranged for a dinner meeting with Ms. Murrah and a friend of Ms. Murrah, Donna Fadal, who was employed as a sales manager at a Dallas radio station. O'Day Ex. 3, p. 1; Tr. 2065. Ms. Leanos had never met or talked to either woman prior to their September 1989 dinner meeting in Dallas. Tr. 2093-2095. At that meeting, Ms. Murrah and Ms. Fadal gave Ms. Leanos the names of two women, Laura Estrada and Anna O'Day, who might meet Leanos' criteria for a general partner including that the person preferably be a minority female. Tr. 2066, 2068, 2092. Ms. Leanos initially contacted Laura Estrada and made arrangements for her to become the applicant's general partner. However, Estrada later changed her mind after Leanos had returned to Maryland. Tr. 2068. Thereafter, Ms. Leanos contacted Anna O'Day, who was a friend of Ms. Fadal, to whom she had spoken by telephone while in Dallas. Tr. 2067. She asked Ms. O'Day for additional information and Ms. O'Day faxed to her a handwritten letter concerning her background. O'Day Ex. 3, p. 1; Poder Ex. 24; Tr. 2068-2069. Ms. Leanos subsequently faxed that letter to the Besozzi law firm and, probably, to Craig Siebert. Tr. 2069. Ms. Leanos, Craig Siebert, Tom Siebert, and Jeff Craven then held a conference call to discuss Anna O'Day's letter and decided to fly Ms. O'Day to Washington for a meeting. Tr. 2070. Craig Siebert paid for Ms. O'Day's airfare and hotel. Tr. 2071.

268. On September 8, 1989, Ms. O'Day met with Jeff Craven, Craig Siebert and Joan Leanos at the law offices of Besozzi and Gavin. The meeting was premised upon the applicant being a limited partnership. Tr. 2076. Ms. Leanos testified that, during the meeting with O'Day, it was discussed that legal fees would likely be $75,000-$100,000, and that there would be a contingency fee arrangement whereby fees would be paid only if the applicant won or there was a settlement, but out-of-pocket expenses would be paid on an ongoing basis. Tr. 2072-2073. Craig Siebert also testified that the costs of prosecuting the application were discussed and estimated to be about $75,000, and that the applicant would pay legal fees only if it won or if there was a settlement. Tr. 1938, 1958. The Besozzi law firm had worked on a contingency basis on other communications projects for Craig Siebert.

269. At the meeting at the Besozzi & Gavin law offices, it was decided that the Besozzi firm would be legal counsel for the Haltom City applicant. Tr. 2039. Craig Seibert testified that he and Joan Leanos wanted the Besozzi firm to represent the applicant, although it was not specifically discussed who would represent them. Tr. 1940, 2039. None of the other persons present had alternative counsel. Tr. 1940. Ms. O'Day stated she was comfortable with Craven and agreed to use of the Besozzi firm. Tr. 2152-2153.

270. At the September 1989 meeting, it was suggested that Ms. O'Day contact Stan Karas, a broadcast consultant, for assistance. Karas had been a consultant for the Siebert/Leanos Valley Station applicant and was a former business partner of Siebert. Tr. 2059, 2080. Ms. O'Day did try to contact Karas, but was unable to get in touch with him. Tr. 2220. It also was suggested that she contact Dick Biby to be the applicant's consulting engineer, and Ms. O'Day contacted Mr. Biby from the Besozzi firm's offices on September 8, but he was not available to represent the O'Day applicant for the Haltom City station. Tr. 2206. Mr. Biby recommended to Ms. O'Day that she contact Schaffer & Associates to assist her in locating a proposed transmitter site, and Ms. O'Day did subsequently secure a reasonable assurance letter from that firm. O'Day Ex. 3, p. 2. Also, as previously discussed, Ms. O'Day obtained from Ms. Leanos the name of Mr. Alexopulos to contact about securing a "reasonable assurance" finance letter.

271. After the meeting with Leanos and Siebert, Ms. O'Day had an afternoon meeting with Besozzi attorney Jeff Craven. Tr. 2079. During that meeting, she made several telephone calls relating to the application, including the call to Biby. Tr. 2129-2130. Also, Mr. Craven gave Ms. O'Day a form bank letter, which she took back to Dallas and later sent to Mr. Alexopulos. Tr. 2129-2131. In addi-

tion, Mr. Craven gave Ms. O'Day a draft of the limited partnership agreement. O'Day Ex. 3, p. 1. Mr. Craven had advised Ms. O'Day to hire another attorney to look at the agreement. Ms. O'Day asked an attorney in the Dallas area to look at it. Tr. 2133. Pursuant to advice from her local attorney, slight changes were made in the agreement. Ms. O'Day could not recall what those changes were. Tr. 2191-2192.

272. Craig Siebert did not perform a credit or reference check on Anna O'Day before entering into a partnership with her. Tr. 1952. He does not know whether Ms. Leanos did any such check. *Id.* Craig Siebert also had never received a financial statement or a resume from Ms. O'Day. Tr. 1936, 1958. He testified that all he knows about Ms. O'Day is that she is a minority female from the Dallas area with broadcast experience who was working for an FM station when the application was filed. Tr. 1952-1953.

273. Ms. Leanos testified that she also did not perform any background check on her sole general partner, Ms. O'Day. After obtaining Ms. O'Day's name from the two women she had met for the first time in Dallas, she did not check out Ms. O'Day with any other references or other sources. Tr. 2091. Ms. Leanos also has never seen a financial statement from Ms. O'Day, nor has she ever discussed Ms. O'Day's financial resources with her, except for the time long after the application was filed, when Ms. O'Day was unemployed and borrowed $750.00 from Ms. Leanos. Tr. 2091, 2185-2186. Ms. O'Day was living with her parents and her 19-month old child as of the hearing. Tr. 2176, 2214.

274. As of the hearing, Craig Siebert had had contact with Ms. O'Day only once since September 1989. In the summer of 1991 he did have one telephone conference call with her, Jeff Craven, Tom Siebert and Joan Leanos to discuss the results of a Haltom City settlement meeting. Tr. 1943. Seibert spoke to the Besozzi firm about the case on at least three other occasions, about document production, his deposition testimony, and his hearing testimony. Tr. 1968-1969. Ms. Leanos has spoken to Ms. O'Day more frequently since September 1989. These telephone calls concerned a possible settlement and capital calls. Also, on one occasion, Ms. Leanos called Ms. O'Day after the birth of Ms. O'Day's child. Tr. 2084, 2099-2100, 2243, 2244.

275. At the hearing, Ms. O'Day could not recall the amounts of her checks for her first and second capital contribution toward expenses and she had not made her third capital contribution of $1900. Tr. 2182. No checks were produced showing contributions from Ms. O'Day. Ms. Leanos has contributed between $2,000-$3,000 and owes another $1,200. Tr. 2083. Mr. Siebert has contributed $20,000-$25,000. Tr. 1947, 2172.

276. Craig Siebert has been a "passive" investor in broadcast applications for Vancouver, Washington; Ormand-by-the Sea, Florida; Ocean City and California, Maryland; and Valley Station, Kentucky. In each of those applications, he has held approximately 80% of the equity and the general partner has been a local female. (Mr. Siebert is aware of the FCC's comparative criteria.) Each application has been represented by the law firm of Besozzi & Gavin. O'Day Ex. 1, pp. 1-2; Tr. 1920-1926, 1934. Mr. Siebert also was limited partner in an applicant for Indianapolis, Indiana, wherein Stan Karas was the general partner. Besozzi & Gavin also represented that applicant. Tr. 1926-1927. Finally, Mr. Siebert is an individual applicant for a Virginia Beach station, also represented by Besozzi & Gavin. O'Day Ex. 2, pp. 1-2. Tr. 1921.

277. Craig Siebert has also held active interests in construction permit or licenses. In the mid-1980s, he was a voting stockholder in the licensees of radio stations in Las Vegas, Pennsylvania and Yorktown, Virginia, along with his brother, Tom Siebert, other members of his brother's law firm, and Stan Karas. Tr. 1925-1926. In the early 1980s, Mr. Siebert had an interest, as a general partner, in a construction permit for Channel 38 in New Orleans, also represented by his brother Tom Siebert's then law firm, Lovett, Hennessy, Stambler & Siebert. Although Mr. Siebert had proposed to be integrated at that station, after he obtained a construction permit by settlement he did not integrate at the station, but sold it in 1985. Tr. 1927, 1956-1957, 1963.

278. Mr. Siebert also was an 82.5% voting stockholder and president of cellular permittees for rural areas near South Norfolk and Kansas City. The Besozzi law firm also represented him in that endeavor. He sold those construction permits in January 1991, approximately a year after their grant, without building any of the systems. Tr. 1954-1955.

Integration

279. Ms. O'Day, General Partner, proposes to integrate full-time, a minimum of 40 hours per week, into the management of the proposed Haltom City station. She will be responsible for implementation and oversight of the station's EEO program. O'Day Ex. 3, pp. 4-5.[37]

280. Ms. O'Day was unemployed at the time her exhibit was prepared but pledged that, in the event she became employed at a later date, she will resign any such employment when grant of O'Day's application has become "final." She became employed as an account executive at KEGL-FM in December 1991. Ms. O'Day testified at the February 1992 hearing that she spent eight hours per day in the development of a new children's clothing company, Divine Creations, but said she would also terminate her role in Divine Creations after grant to O'Day became final. O'Day Ex. 3, p. 4; Ex. 3A.

281. *Minority.* Ms. O'Day is an Hispanic woman. O'Day Ex. 3, p. 5.

282. *Local Residence and Civic Activities.* Ms. O'Day has lived in various locations in the Dallas-Ft. Worth area over the past 26 years. She currently resides in Ft. Worth. All of her residences are located within the O'Day proposed service area. Ms. O'Day proposes to relocate to Haltom City within thirty dates after grant of O'Day's application becomes "final." O'Day Ex. 3, pp. 5-7.

[37] The application form utilized by O'Day required that any integration proposal include a description of the proposed position and duties. As of the January 1990 cut-off date, O'Day had not submitted such information, stating only that Ms. O'Day would integrate full-time in management, failing to identify the position and duties. Thus, the Presiding Judge rejected that portion of O'Day's exhibit proposing her as its general manager, as an attempt to untimely upgrade its application. Tr. 244-248, 251-253, 2217.

283. Ms. O'Day has been involved in the following civic activities, which serve Haltom City and other portions of the proposed O'Day service area:

(a) Volunteer for Tarrant County Humane Society, 1972-1973, working with animals.

(b) Volunteer at Presbyterian Hospital of Dallas, 1979-1981, delivering patient mail and flowers.

(c) Member of auction committee of American Women in Radio and Television, 1983, helping to raise money for Scottish Rite Crippled Children's Hospital.

(d) Group Speaker at The Family Place; 1984-1985, working with moderator of therapy groups.

(e) Member of Hospitality Committee, Association of Broadcast Executives of Texas, 1984-1985.

(f) Public Speaker for The Family Place; 1984-1987. Recognized for her efforts as designated speaker in 1986.

(g) Member of the public relations committee for The Family Place, 1985-1987.

(h) Member of Dallas Symphony Innovators; 1985, helping raise money for the Dallas Symphony Orchestra.

(i) Volunteer at Parkland Hospital (County Hospital of Dallas), 1986.

(j) Member of Board of Directors of Radio Marketing Association, 1988-1990, working with other board members to formulate agenda for monthly meetings of the Association. Also chaired the Target Account Committee whose function was to convert a newspaper advertiser to a radio advertiser (but only to the extent that radio was a good medium for that advertiser and no one station benefitted exclusively).

O'Day Ex. 3, pp. 9-11; Tr. 2251.

284. *Broadcast Experience.* Ms. O'Day has held the following broadcast positions:

(a) Administrative Assistant (secretary to assistant general manager) at KDFW-FM from January 1974 through March 1975.

(b) Account Executive at KWXI-AM, from March 1975 through September 1975.

(c) Promotions Director at KLIF, from October 1975 through April 1976.

(d) Account Executive at KAFM, from March 1977 through July 1978.

(e) Account Executive at KVIL, from July 1978 through April 1988.

(f) Local Sales Manager at KZEW/KLDD, from April 1988 through December 1988.

(g) General Sales Manager at KMEZ/KDBN, from January 1989 through January 1990.

(h) Account Executive at KJMZ/KHVN, from July 1, 1991 through September 18, 1991.

(i) Account Executive at KEGL-FM since December 1991.

O'Day Ex. 3, pp. 8-9; Ex. 3A.

Diversification

285. Neither O'Day nor its general partner, Anna O'Day, have any ownership interest in any medium of mass communications. O'Day Ex. 2, p. 1. O'Day's limited partners, Joan Leanos and Craig Siebert, also have no ownership interest in any medium of mass communications. O'Day Ex. 2, pp. 1-2.

Auxiliary Power

286. O'Day will install auxiliary power facilities at its studio and transmitter sites. O'Day Ex. 4, p. 1.

John W. Barger

Ownership

287. John W. Barger is an individual applicant.

Integration

288. John W. Barger does not propose integration of ownership and management in his proposed Haltom City radio station. Barger Ex. 1, p. 1.

Diversification

289. Mr. Barger is President, a director, 40% beneficial stock owner and 100% voting stockholder under a shareholders' agreement, in April Communications Group, Inc. (April) which on February 28, 1991 acquired the license of KWCB(FM), now KRIO-FM, Floresville, Texas. Barger Ex. 1, p. 3.

290. On March 28, 1991, the FCC granted to Barger a construction permit for a new FM station in Pearsall, Texas. Mr. Barger testified that since this grant authorized construction at a transmitter site which he no longer desires, he has filed a petition for reconsideration seeking "modification of the grant" to specify another transmitter site which he proposed before grant but which was not considered by the Commission. *Id.*

291. Mr. Barger also has an ownership interest in the application of August Communications, Inc. (BPH-880714MN) for a new FM station at Round Rock, Texas. In that proceeding, Mr. Barger proposed integration and pledged to divest his interests in April and in the Pearsall station, should his Round Rock application be granted. *Id.* No such divestiture pledge is made in this proceeding.

Auxiliary Power

292. Mr. Barger proposes to install auxiliary power facilities at both the transmitter and studio locations. *Id.*

Melanie Bruton

Financial Qualifications Issue

293. Melanie Bruton certified in September 1989 that she was financially qualified based on a letter of credit from Allied Capital Corporation of Washington, D.C. in the amount of $700,000. Her estimated expenses were $624,725. Bruton Ex. 6, p. 1. By Memorandum Opinion and Order, FCC 92M-302, released March 10, 1992, the Presiding Judge added a financial issue against Bruton since a substantial question existed as to the continued viability of the Allied commitment.

294. On March 6, 1992, Bruton filed a petition for leave to amend Section III (the financial qualifications section) of her application to substitute a new source of funds for the construction and operation of her station. In the amendment, Ms. Bruton proposed to rely on a loan commitment in the amount of $700,000 from George W. Marti. By Memorandum Opinion and Order, FCC 92M-554, released May 12, 1992, the Presiding Judge granted Bruton's petition and accepted the amendment.

295. Marti, an equipment manufacturer, financed the acquisition of Stations KDSI(AM) and KQNN(FM), Alice, Texas and Station KNGV(FM), Kingsville, Texas by Robert R. Bruton, Melanie Bruton's husband in the late spring/early summer of 1991. Marti originally owned 49.1% of Jefco Enterprises, the licensee of the above three stations, and a Mr. Earl Fletcher owned the remaining 50.9%. After Fletcher died in late 1990, his wife succeeded to his interest. Marti transferred his 49.1% interest to Mr. Bruton for no consideration and then filed a transfer of control application with the FCC on March 15, 1991 pursuant to which Mrs. Fletcher transferred her 50.9% stock interest to Marti in exchange for Marti's assumption of a $70,000 note owed by Mrs. Fletcher and a $50,000 cash payment. Marti then immediately transferred the stock to Mr. Bruton in return for a $425,000 promissory note. Tr. 2755-2757; Prairie Exs. 26, 27, 28. Mr. Bruton put down no cash. At the same time, Marti sold approximately 20 acres of land and a building that he personally owned, which were associated with the radio stations, to Mr. Bruton in return for a promissory note in the amount of $125,000. Mr. Bruton again advanced no cash. Tr. 2757-2758. Marti also agreed to finance 100% of the cost of automation equipment amounting to $20,000 and a third note was executed for that equipment. Tr. 2758-2759. Thus, Mr. Bruton acquired the Alice and Kingsville stations for $570,000 which was wholly financed by George Marti. Tr. 2759. Although Mr. Bruton was not a personal friend of Marti's, Marti knew of Mr. Bruton as a broadcaster and knew that he had worked for Earl Fletcher for many years. Tr. 2759.

296. The $425,000 promissory note dated June 28, 1991, signed by Robert R. Bruton required the payment of interest beginning January 1, 1992 and the payment of principal and interest beginning August 1, 1993. Prairie Ex. 28, p. 1. Mr. Bruton was also required to pay his part of the *ad valorem* tax on all the real estate from July 1, 1991 to the end of the year amounting to $500 and $800. Tr. 2759-2761. Payments on the five year $20,000 note associated with the equipment of 9% interest were also to have been made monthly. Tr. 2761.

297. Mr. Bruton did not pay the *ad valorem* tax on the real estate and did not make any payments on the five year note on the equipment. He also failed to make the payments that were due beginning January 1, 1992 on the $425,000 promissory note. Tr. 2761-2762.

298. Marti decided to foreclose on all of the assets of the Alice and Kingsville stations when he found that the IRS had filed a lien against the assets of the stations. Tr. 2772. On April 8, 1992, a Statement of Foreclosure of Assets was signed by and between Robert R. Bruton, Bruton Broadcast Communications, Inc. and Alice Radio Co. pertaining to the assets of Stations KDSI(AM) and KQNN(FM), Alice, Texas. Prairie Ex. 31. The Statement of Foreclosure recited that Bruton had defaulted under the terms of the Note and Security Agreement and that as of April 8, 1992, there was due and owing on the Note the principal sum of $425,000 plus accrued interest at a rate of 9% per annum from January 1, 1992. Prairie Ex. 31, p. 2. Also on April 8, 1992, a Statement of Foreclosure of Assets relating to the assets used by or attributable to the operation of Station KNGV-FM, Kingsville, Texas was signed by Robert R. Bruton, Burton Broadcast Communications, Inc. and Kingsville Radio Co. Prairie Ex. 32.

299. On April 28, 1992, an application was filed with the FCC to assign the licenses of the Alice, Texas stations from Bruton Broadcast Communications, Inc. to Alice Radio Co. Marti is the President and 100% shareholder of Alice Radio Co. and his wife is the Vice President, Secretary and Treasurer. Tr. 2775. A second application was filed on April 28, 1992 to assign the license of the Kingsville, Texas radio station from Bruton Broadcast Communications, Inc. to Kingsville Radio Co. Marti's daughter, Michelle, is President and 100% shareholder of Kingsville Radio Co. and his wife is Vice President, Secretary and Treasurer. Tr. 2775.

300. Marti has had no previous business involvement with Melanie Bruton. The extent of their personal involvement was that Ms. Bruton had seen and spoken to Marti at radio conventions. Ms. Bruton said she didn't know if these could even be called "social." Ms. Bruton has not seen Marti socially other than at radio conventions. She does not know Marti's wife, did not meet his daughter Michelle Marti until April 8, 1992, the day before her deposition, and does not know any other members of Marti's family. Tr. 2721, 2829-2830.

301. Ms. Bruton was in Kingsville, Texas when she received the Order of February 25, 1992 adding a financial qualifications issue. She discussed the Order with her counsel. Tr. 2830-2831. On approximately February 27th, Ms. Bruton called Marti. She advised him that she had applied for the Haltom City channel and needed a loan of $700,000. Tr. 2835. Marti made clear to her that the most important factor was the stations's proposed coverage. Tr. 2781-2782.

302. Ms. Bruton said that she called Marti because she knew that he was familiar with the Dallas market and she knew that he had loaned money to broadcasters including her husband. Mr. Bruton's March 4, 1992 Declaration states that Marti told her he had loaned money to other broadcasters to use for starting new stations (Bruton Ex. 6, pp. 4-5). However, Marti testified that he had never financed any other new applications. Tr. 2819-2821. At the time she called Marti, she knew Marti held a note on her husband's stations and that her husband owed Marti money. Tr. 2851. Ms. Bruton said that she didn't discuss with her husband that she was calling his creditor for financing and didn't think it was important to discuss his debts to Marti. Tr. 2851. Ms. Bruton said she told her husband a couple of days after she had spoken with Marti and he was "very surprised" but felt it was "good for me." Tr. 2852. She said that the first time she learned that Marti had foreclosed on the Alice and Kingsville stations was the

week preceding the May 18th hearing sessions. Although Ms. Bruton knew that her husband and Marti had been having some discussions and meetings around April 8, 1992, and she also had a meeting with Marti on April 8, 1992 -- prior to her April 9, 1992 deposition -- she testified that that the subject of the foreclosure did not come up during the April 8, 1992 meeting with Marti. Tr. 2852-2853. Ms. Bruton's husband is now unemployed and has been sending out resumes looking for work. Tr. 2853. Ms. Bruton is also unemployed. Tr. 2864.

303. Following their initial conversation on or about February 27, Ms. Bruton sent Marti a joint personal financial statement for herself and her husband, her proposed budget for construction and operation and a coverage map for her proposed station. Bruton Ex. 6, p. 5. Marti had not requested the joint financial statement and didn't pay any attention to the statement. Tr. 2845-2846, 2786. Thereafter, her counsel prepared a proposed loan letter and Ms. Bruton reviewed it before counsel sent it to Marti. Tr. 2854. The terms of the letter were negotiated by counsel and Marti, and Ms. Bruton reviewed and approved it immediately after Marti signed. Tr. 2854-2855.

304. Marti's loan letter to Bruton, signed on March 5, 1992, reads as follows (Bruton Ex. 8):

Dear Ms. Bruton:

You have described to me your efforts to prosecute an application to the Federal Communications Commission ("FCC") for a construction permit to build a new FM broadcast station licensed to Haltom City, Texas. I understand you are applying as an individual, but that you would be willing to form a corporation, of which you would be the sole stockholder, in order to permit pledging corporate stock to secure borrowing for construction and initial operating costs.

You have asked me to provide reasonable assurance of my willingness to lend such a corporation up to $700,000 to finance the construction and initial costs of the new station. This is to advise that I am prepared to make a loan of that amount, when and if the FCC issues a construction permit to you or your corporation, under the following terms and conditions:

1. The loan would be repayable over a seven year period in monthly installments, but with no repayment of principal due during the first two years. Thereafter, the loan would be amortized with equal payments of principal and interest due in monthly installments, commencing with the first such installment due twenty-five months after the initial draw against the loan.

2. Interest at three percentage points over the prime rate prevailing in Dallas when the funds are borrowed would be due and payable monthly.

3. I will require a first-position pledge of all corporate stock of the broadcast permittee. You would agree, as a part of a stock pledge agreement, that, in the event of a sale at foreclosure of your stock under that agreement, you would sign the transferor's and licensee's portions of an application for FCC consent to transfer of the stock to the purchaser at foreclosure sale, and would sign any and all other necessary documents and render all necessary assistance in order to obtain FCC consent and thereafter effectuate the transfer of the stock to the purchaser.

4. I would also require a first-position security interest in all station assets.

5. I would also require your personal guarantee of repayment of the loan.

My agreement to provide this loan to you is based primarily on my knowledge of the value of the station you propose to construct. I have been closely associated with the broadcasting industry for over thirty years and as a resident of Texas I am familiar with both Haltom City and the Dallas/Ft. Worth market in which the station will be located. I understand that the station will serve approximately 2.6 million people.

I have reviewed the financial information you provided for yourself and your husband and I am also familiar with your husband's finances because I sold him my interests in radio stations KNGV, KDFI and KQNN last year and hold promissory notes from him as a result of that sale.

I have not spoken to your husband regarding this matter. The loan described herein will be made directly to your or your corporation which I understand will be solely owned by you. I will not require that your husband personally guarantee the loan or pledge any collateral for it. I have reviewed the materials you sent me describing your experience in broadcasting and business. I am confident that your operation of the station will be successful and that its value will provide more than adequate collateral for my loan. In the past I have made loans to others for the purpose of starting new broadcast stations, so I am familiar with the potential problems and risks involved in this type of venture.

I have provided you with a copy of my personal financial statement to demonstrate that I have liquid assets in excess of current liabilities which greatly exceed the amount of my proposed loan to you. Please feel free to make this statement available to the FCC to demonstrate that I am capable of lending you $700,000.

While you have not paid me any consideration for my agreement to make this loan and it therefore does not constitute a binding commitment in the legal sense, I have every intention of making the loan when your application is granted.

305. Marti testified that he had agreed to make the loan to Ms. Bruton after reviewing the technical proposal for her station, because it would serve 2.6 million people and he believes that a station in the Haltom City area would be very profitable. Tr. 2806-2807. He has lent money to a number of radio stations and had between $2.5 million and $3.0 million in outstanding loans to stations at the time of his testimony. Tr. 2819. After reviewing Ms. Bruton's technical proposal, Marti made his own determination that her station would be worth between $2.1 million and $2.4 million and he felt that this value would provide good security for a $700,000 loan. Tr. 2789.

306. Before signing the loan letter to Bruton, Marti discussed the terms with Bruton's counsel. Tr. 2791. He told counsel he would require a first mortgage on all of the assets of the station, a pledge of all of the stock of the licensee and a personal guarantee from Bruton. Tr. 2821. These are the standard terms he requires in all of his loans to broadcasters. tr. 2801. The personal guarantee provision is included in these loans on the advice of Marti's lawyer.

Tr. 2804. Marti was not concerned whether Ms. Bruton had any resources to support her personal guarantee "[s]ince she could after one year and one week, whatever the deadline is, she could sell the radio station for more than enough money to pay me off." Tr. 2804. Also, if Ms. Bruton defaulted on the loan, he would be protected because he could foreclose on the station and sell it for a profit. Tr. 2803. Marti had foreclosed on a defaulted loan to Station KKJO, St. Joseph, Missouri and sold the station at a profit after taking over the station and operating it for nine years. Tr. 2764-2766.

307. The $700,000 loan from Marti is to be used solely for construction and three months operation of the proposed station and does not cover costs of prosecution of Ms. Bruton's application. Tr. 2784, 2794, 2846, 3346-3347. Ms. Bruton testified at her April 9, 1992 deposition that funds for prosecution of her application will come from her personal funds. Tr. 3346-3347. Ms. Bruton, however, does not have funds of her own to put into the station. (Joint Financial Statement of Melanie and Robert Bruton).[38] Prairie Ex. 54, pp. 1-2; see also Prairie Ex. 33.

308. As of the May 1992 hearing Ms. Bruton owed her prior communications law firm, Mullin, Rhyne, Emmons & Topel, about $28,000, which amount included financial charges added during the time the bill has remained unpaid. Tr. 3230. Ms. Bruton testified that she will pay those legal fees also out of the station's profits after she obtains the construction permit. Tr. 3288. Ms. Bruton also has agreed to pay her current communications attorney, Mr. Bernard, out of the station's revenues. Tr. 3242. She retained Mr. Bernard in January or February of 1992, but until May 1992 the only understanding they had was that they would discuss the question of his fees "later." Tr. 3242. After her April 1992 deposition, but before the May 1992 hearing session, they agreed that his fees would be paid out of station income. Tr. 3234, 3241-3242.

309. Ms. Bruton has "no idea" what Mr. Bernard's legal fees will be when she obtains the station. Tr. 3237. She knows what his hourly rate is, but has no idea of the number of hours he has put into the case so far. She has received no bill and has paid him nothing. Tr. 3237-3238. She and Mr. Bernard have not discussed the time period for repayment or what will happen if Ms. Bruton is unable to make the payments to Mr. Bernard out of station revenues. Tr. 3243. There is no "cap" on the amount of his fees. Tr. 3245. Ms. Bruton has not discussed with Mr. Marti the fact she owes legal fees to her current and former attorneys. Tr. 3246.

310. Marti lives in Cleburne, Texas which is 30-35 miles from Haltom City. He is a 20% owner and Vice President of Fletcher Broadcasting, Inc., the licensee of Station KCLE(AM), Cleburne, Texas. Fletcher Broadcasting, Inc. also owns an AM station in San Saba, Texas and an FM permit in Glen Rose, Texas. Tr. 2808-2809.

311. In order to demonstrate that he had adequate funds available to lend $700,000 to Bruton, Marti provided Ms. Bruton with a copy of his January 1, 1992 financial statement. Bruton Ex. 10, ¶ 1; Bruton Ex. 9. He owns two thirds of the stock of Marti Electronics, Inc. a Chapter S corporation which distributes most of its earnings to stockholders each year. Bruton Ex. 10, ¶ 2; Bruton Ex. 9, pp. 23, 10. In 1991, Martin withdrew $1.562 million from Marti Electronics, and the Corporation had a net cash flow of $2,437,958. Bruton Ex. 10, ¶ 3. The corporation continues to be profitable and Marti has no reason to doubt that more than $700,000 will be available to him from Marti Electronics in the future as a source of a loan to Bruton. *Id.* Marti Electronics had $1,236,302 in cash assets on December 31, 1991 and only $35,670 in liabilities. Bruton Ex. 9, pp. 4-5.

312. Marti stated that he had several different methods available for obtaining the money to loan Bruton and he would use one of them. Bruton Ex. 10, ¶ Tr. 2791. Although he would personally make the loan, he might elect to borrow the funds from a bank or banks where he can borrow money at the prime rate. Tr. 2791-2813. The simpler method would be to merely withdraw the funds from Marti Electronics. Bruton Ex. 10, ¶ 3; Tr. 2791.

Misrepresentations

313. In May 1992, a hearing was held to try the financial qualifications issue against Melanie Bruton. As discussed, *supra*, that hearing focused primarily upon the March 3, 1992 loan letter from George W. Marti to Ms. Bruton proposing a $700,000 loan to cover the cost of constructing and initially operating Mrs. Bruton's proposed Haltom City station. In the process of obtaining the Marti letter, Ms. Bruton sent Marti a February 1, 1992 joint financial statement for her and her husband, Robert Bruton. Bruton Ex. 6, p. 5; Prairie Ex. 33; Tr. 2845-2846.

314. At the May 20, 1992 hearing session, Ms. Bruton was cross-examined about the various assets listed on the joint financial statement given to Marti. At one point in the hearing the following dialogue ensued:

> Q: Now what is the $700,000 that you're going to be obtaining from Mr. Marti going to be used for?
>
> A: For construction and operation of the first three months of the station.
>
> Q: And *will you put any money of your own into the construction and first three months operation expense?*
>
> A: *I haven't decided that. I have enough funds set aside for that.*
>
> Q: Well, if you would look at Prairie Exhibit 33, Ms. Bruton, do you have any funds set aside on Prairie Exhibit 33?
>
> A: You mean my showing in this financial statement?
>
> Q: Yeah. Does this financial statement show funds set aside for Haltom City?
>
> A: Not specifically, no.
>
> Q: And am I correct that Mr. Bruton is not -- Mr. Marti's not going to require you to put in any financing of your own, is he?
>
> A: No, he is not.

[38] The radio stations listed there, the most significant asset of Mr. Bruton, have been assigned to Marti. Also, the residence listed owned by Mr. Bruton was the subject of a foreclosure proceeding.

Tr. 2846 (emphasis added).

315. On December 22, 1992 Prairie filed a Motion to Reopen the Record and Enlarge the Issues Against Melanie Bruton (Motion) based, in part, upon Ms. Bruton's May 20, 1992 hearing testimony that she had not decided whether to put in her own money and that she had enough funds "set aside for that." Poder Ex. 75. In the Motion, ¶ 12, Prairie charged Ms. Bruton with falsely representing that she and her husband had financial resources. It cited Ms. Bruton's May 20, 1992 hearing testimony that she had "funds set aside," but noted that on May 17, 1992, only three days before Ms. Bruton had made those statements, her husband had represented to a local Tarrant County judge that he could not pay a bill from Dillard's Department Stores in the amount of $1,868.28 because neither he nor Ms. Bruton was employed and "savings and retirement income have been exhausted." *Id.*, see *Memorandum Opinion and Order*, FCC 93M-68 (released February 11, 1993 (*MO&O*)), p. 2, Note 3.

316. On January 17, 1993, Ms. Bruton executed a Declaration which was submitted with Bruton's Opposition to Prairie's Motion to Reopen the Record and Enlarge the Issues. Ms. Bruton's January 17, 1993 Declaration contained no explanation concerning her May 20, 1992 hearing testimony with respect to putting her own money toward the expenses of construction and the first three months of operation (*i.e.*, "I haven't decided that. I have enough funds set aside for that"). Instead, Ms. Bruton's January 17, 1993 Declaration contained the following representations:

> The pleadings filed by Prairie contain a letter from my husband to Judge Ritchie, of the Tarrant County, Texas, Justice of the Peace Court, concerning an amount he owed to a department store. The account in question was not a joint account and I was not named in the law suit concerning it. Moreover, I do not believe that I was aware of this letter until I reviewed Prairie's filing in early January of 1993. My husband and I have always maintained a degree of financial independence. For example, our residence remained solely in his name throughout our marriage, we have individual charge accounts and credit cards, one of our automobiles is titled solely in his name and I had no interest in the stock in the corporation which owned the radio stations listed on the Joint Financial Statement.

(Prairie Ex. 56, p. 2).

317. In adding a misrepresentation/lack of candor issue against Bruton, the Presiding Judge concluded there was a substantial question as to whether Ms. Bruton had been truthful in asserting her financial independence from her husband. The *MO&O* noted that Ms. Bruton had not withdrawn or modified her assertion, at the May 1992 hearing, of a source of funds to draw upon independent of her husband, and that her opposition pleading was "silent" as to the basis of her claim that she had funds available for her proposed station. *MO&O*, p. 3 and Note 4. Further, Ms. Bruton's assertion, in her January 17 Declaration, that she and her husband had a degree of financial independence, was difficult to reconcile with the Brutons' Joint Financial Statement, which did not reflect a source of funds for Ms. Bruton's use. Indeed, the Presiding Judge noted that the Brutons' assets had been largely dissipated, as reflected in Mr. Bruton's representations to a local judge that neither he nor his wife could find work, or was eligible for unemployment compensation, and savings and retirement income was exhausted. *MO&O*, p. 2, Note 3. It was concluded that in light of the unrebutted evidence of the Brutons' poor financial condition and the lack of evidence to support Ms. Bruton's claim of funds to utilize for the station, a misrepresentation issue was warranted.

318. On March 2, 1993, after the misrepresentation/lack of candor issue had been added and after Bruton had received Prairie's Notice of Depositions, Bruton filed an Opposition to the Notice to which was appended a further Declaration of Melanie Bruton, dated February 25, 1993. This was the first time Ms. Bruton addressed the question of why she had said at the May 20, 1992 hearing session that she hadn't decided whether to contribute her own funds to the construction and operation of the station and she had enough funds "set aside" for that. In her February 25, 1993 Declaration, Ms. Bruton stated:

> My intent when I gave the foregoing answers was to indicate that while I hadn't decided whether to contribute personal funds to the station, I didn't have to make such a decision because the $700,000 Mr. Marti had agreed to lend me were "set aside" funds which would be "enough" to construct and operate the station.
>
> At all times since my application was filed in 1989, I have relied on borrowed funds to demonstrate my financial qualifications. I have never proposed to invest my personal funds or funds from assets owned by my husband into the construction and operation of my station. When I testified on May 20, 1992, I did not have any personal funds or assets which I contemplated using as a possible source for making a personal investment in the station and I did not intend to create that impression.

(Prairie Ex. 57, p. 2).

319. On March 16, 1993, Ms. Bruton was deposed on the misrepresentation/lack of candor issue. In connection with the deposition, Prairie and Bruton entered into the following Joint Stipulation.

> Melanie Bruton does not now have, did not have at the time of her May 20, 1992 hearing testimony, and has never had any personal funds or assets which she intended to use as a possible source for making a personal investment in her proposed Haltom City station or for her personal guarantee to George Marti. Ms. Bruton has not had any assets other than those set forth on the Joint Financial Statement dated February 1, 1992. Ms. Bruton never intended to use any of the assets set forth on the Joint Financial Statement for a personal investment in her proposed Haltom City station or for her personal guarantee to George Marti.

(Prairie Ex. 54). Furthermore, during the March 16, 1993 deposition, Bruton's counsel stipulated that Ms. Bruton had no assets to support the personal guarantee required by

the Marti loan letter. Prairie Ex. 55, pp. 3 and 7.[39] Ms. Bruton admitted at the May 3, 1993 hearing that she had no assets available to personally guarantee repayment of a $700,000 loan. Tr. 3280.

Ms. Bruton's Explanation of Her May 20, 1992 Hearing Testimony

320. At the May 3, 1993 hearing, Ms. Bruton claimed that when she testified on May 20, 1992, "I haven't decided that. I have enough funds set aside for that," the first part of the sentence meant that she hadn't decided whether she would put any money of her own into the construction and operation of the station and the second part of the sentence meant that she had enough funds from Mr. Marti set aside for that. Tr. 3250-3252. However, she admitted that at the time she made the statement she did not have any funds that she proposed to put into the station, and, when asked if Marti had set aside any funds to loan her, she said he has talked about different options but she does not know whether any funds are sitting there. Tr. 3250-3253, 3272. Ms. Bruton claimed that the phrase "set aside" funds was just a legal term the attorneys had used to refer to the loan from Mr. Marti. Tr. 3252-3253. She said that when she referred to funds as "set aside," she was merely attempting to use the description of Marti's loan used by her counsel in March 1992. Prairie Ex. 57. But she could not provide a clear answer as to why she didn't explain her definition of "set aside" funds on May 20, 1992. Tr. 3311-3312.

321. Ms. Bruton reviewed Prairie's December 22, 1993 Motion to Reopen the Record and Enlarge the Issues including paragraph 12. Tr. 3293. She was asked several times why she didn't address the question of her May 20, 1992 testimony on the "set aside" funds in her January 1993 Declaration opposing addition of issues. Ms. Bruton first said she didn't feel it needed explaining. Tr. 3253. Later, she said, "I don't believe the issue had been made an issue at that point in time" and she didn't know why it wasn't addressed. Tr. 3293-3294. Subsequently, when the Presiding Judge asked Ms. Bruton why if she had an explanation for the term "set aside," she hadn't included that explanation at the time she opposed the addition of a misrepresentation issue, Ms. Bruton responded that "it was an oversight" and she thought the major issue was her husband's bankruptcy and the lawsuit that Dillard's department store had brought against her husband. Tr. 3320-3323. She maintained that "until the issue was brought up it just never hit me that that needed explaining". Tr. 3325. However, at her May 16, 1993 deposition, Ms. Bruton testified that she didn't think the statement she made at the May 20, 1992 hearing needed clarification. She said, "To me it was clear cut and a straight answer." Tr. 3342.

Ms. Bruton's Claim of Financial Independence

322. In her January 17, 1993 Declaration which was submitted with Bruton's Opposition to Prairie's Motion to Reopen the Record and Enlarge the Issues, Melanie Bruton also claimed that she and her husband "have always maintained a degree of financial independence". Prairie Ex. 56, p. 2. Ms. Bruton was asked why she was contending that she was financially independent in January 1993. She claimed that "all I reflected in that statement was that the Dillard's [account] was in his name only". Tr. 3254. Ms. Bruton conceded that she and her husband have had joint credit cards, and sometimes she and her husband would order two credit cards from the same company -- one in his name and one in hers. Tr. 3270. Melanie and Robert Bruton jointly own a 1988 Lincoln Town Car, and Melanie Bruton does not own any vehicles personally. Tr. 3270-3271. Robert Bruton was single at the time the Bruton home on Pearl Drive in North Richland Hills, Texas was purchased. Tr. 3285. During the time that Robert Bruton owned the Pearl Drive residence, that is where Melanie Bruton primarily resided. Tr. 3286-3287. After the Pearl Drive home was foreclosed upon and the Brutons were evicted on October 5, 1992, Melanie Bruton had to change her residence also. Tr. 3287.

323. During the period February 1, 1992 - June 1992, Melanie Bruton did not have any savings accounts and maintained one checking account at the Bank of North Texas entitled "Melanie M. Bruton Business Account." Tr. 3214-3215; Prairie Ex. 58. From February 1992 until approximately April 1, 1992, Robert Bruton maintained a separate bank account but subsequent to April 1, 1992, Robert Bruton did not maintain a separate savings or checking account and he placed his unemployment checks in Melanie Bruton's business account. Ms. Bruton acknowledged that some of the deposits shown on the Melanie Bruton Business Account statements for the period April 22, 1992 - May 20, 1992 and for the period May 20, 1992 - June 22, 1992 included her husband's unemployment checks. Tr. 3217-3218; Prairie Ex. 58.[40] As of March 1993, Robert Bruton was continuing to use the Melanie Bruton business account to deposit any sums he earned. Tr. 3283.

Comparative Issue
Ownership and Background

324. Melanie Bruton is an individual applicant for a new FM station in Haltom City, Texas. Bruton Ex. 1. Ms. Bruton is presently unemployed. Tr. 1778. She worked about two weeks in 1991 and didn't work in 1990. She doesn't own any businesses. Tr. 1777. At the time of the hearing on Ms. Bruton's comparative case in November 1991, her husband Robert Bruton was working. Ms. Bruton stated that if she was awarded the construction permit for Haltom City, her husband would sell his stock and resign all corporate positions and connections of any

[39] Bruton's counsel stipulated that the sum and substance of Ms. Bruton's assets consisted of some jewelry and antiques. Prairie Ex. 55, pp. 5-6. Ms. Bruton had certain pieces of gold appraised in 1981. She never obtained appraisals on the silver, antiques and art listed on the Joint Financial Statement. Tr. 3223-3224. The Joint Financial Statement dated February 1, 1992 shows a value of $90,000 for Ms. Bruton's jewelry, antiques and art. Prairie Ex. 33.

[40] In his May 17, 1992 letter to Judge Ritchie of the Tarrant County, Texas court, Robert Bruton represented that he was not eligible for unemployment compensation. Prairie Ex. 59.

kind with Jefco Enterprises, Inc., licensee of Stations KDSI(AM) and KOPY(FM), Alice, Texas and KNGV(FM), Kingsville, Texas. Bruton Ex. 2.[41]

325. Ms. Bruton first learned of the availability of the Haltom City construction permit from her husband. Her husband gave her the name and telephone number of an engineer. Tr. 1779. At the time, Mr. Bruton was a Vice President of Satellite Music Network. Tr. 1784. Ms. Bruton filed her application about the time Mr. Bruton left Satellite Music Network. Ms. Bruton had no discussions at that time with her husband about his owning a radio station. Tr. 1781. Subsequently, however, Mr. Bruton acquired three stations in Alice and Kingsville, Texas. Tr. 1755-2757. Ms. Bruton has used funds from a joint account for her application preparation and filing expenses. Mr. Bruton contributed a great deal more in funds to the joint account than she did. She also set up a Melanie M. Bruton business account. The Melanie Bruton business account and the joint account are at the same bank and Ms. Bruton acknowledged that funds from the joint account had been shifted into the business account. Tr. 1789-1796. Mr. Bruton was aware that Ms. Bruton was going to file an application but did not discuss with him the cost of the project. Tr. 1889. She discussed with him the requirement he would have to divest his Alice and Kingsville station interests. She did not discuss with him her proposed site. Tr. 1889-1890. She also told him she was involved in settlement discussions. Tr. 1890. Robert Bruton attended one of the three settlement meetings in the Haltom City case that Melanie Bruton chaired. He was invited by John Barger. Tr. 1801-1802.

326. At the time of the hearing sessions in November 1991, Ms. Bruton testified that she had briefly considered owning the Alice and Kingsville stations with her husband, and she had considered working at one of the stations as General Manager. But she said that she was not working at the stations and was only spending 2 or 3 days a month in Alice/Kingsville. Tr. 1764-1766. During the May hearing session, Ms. Bruton indicated that in February and March 1990, for about a month she handled the bookkeeping, payroll and traffic for all three stations. Tr. 1865-2867.

Integration

327. Ms. Bruton proposes to work full-time, a minimum of forty hours per week, as the general manager of her proposed station. As such, she would supervise all station operations, make policy decisions and have overall responsibility for the performance of all station departments. Ms. Bruton testified that she currently has "no other business interests or employment," but should she become involved in any other activity prior to commencement of operations at the Haltom City station, she proposes to terminate such activity in order to assume her duties as general manager. Bruton Ex. 1, p. 1.

328. *Local Residence and Civic Activities.* From July 1979 to February 1980, Ms. Bruton resided in Bedford, Texas, within the 3.16 mV/m contour of her proposed facility. Bruton Ex. 1, p. 2. From February 1980 to March 15, 1993, Ms. Bruton resided in North Richland Hills, Texas. Bruton Ex. 1, p. 1. She currently resides in Fort Worth, Texas which is also within the 3.16 mV.m contour. See *Order*, FCC 93M-250, released May 12, 1993. Ms. Bruton testified that North Richland Hills is contiguous to Haltom City and is within the 3.16 mV/m contour of the proposed station. Bruton Ex. 1, p. 1. However, Haltom City has a substantially larger contiguous border with Fort Worth than with North Richland Hills. Tr. 1748-1750; Prairie Ex. 19. Haltom City also borders Hurst, Watauga and Richland Hills. Tr. 1748.

329. Ms. Bruton has been involved in the following local civic activities:

(a) During the time her son attended Richland High School, from 1983 to 1986, Ms. Bruton was a Richland High School PTA member, devoting approximately 2 hours per week to this activity. Her responsibilities included fundraising activities, being hostess at school openings and dance chaperon. Bruton Ex. 1, p. 2; Tr. 1812-1813. Bruton did not serve on any board or committee and went to meetings only occasionally. Tr. 1809. Most PTA meetings were held at Richland High School, others were held at Birdville Coliseum. The city of address for that Coliseum is listed as Ft. Worth in a Birdville School District map. Tr. 1813, 1816-1817. In her direct case written exhibit, Ms. Bruton identified the organization as the Birdville PTA. Birdville is the school district encompassing Haltom City, Richland Hills, North Richland Hills, Watauga, Hurst, and at least part of Fort Worth. Tr. 1809-1812. There is no school called Birdville. Tr. 1818. Haltom City and the other communities in the Birdville District have separate schools and a separate PTA. Tr. 1810. Except for Hurst and Smithfield, all schools listed in a Birdville School District map bear a Ft. Worth address. Tr. 1850-1851.

(b) In 1986, Ms. Bruton devoted about 30 hours to an American Cancer Society, North Richland Hills chapter, fundraiser.

(c) In 1988-1989, Ms. Bruton spent about 40 hours on an American Heart Association, North Richland Hills chapter, fund raiser.

(d) Between 1986 and 1989, Ms. Bruton worked with the Beautiful Street Ministry for Homeless Clothing Drive in Fort Worth. She devoted approximately 200 hours to this activity, contacting donors and picking up and delivering clothing.

(e) In 1988, Ms. Bruton spent about 25 hours as a North Richland Hills Halloween Party Sponsor, arranging for a party for the city's children.

Bruton Ex. 1, pp. 2-3.

330. *Broadcast Experience.* From March 1983 to the present, Ms. Bruton has been a freelance film, video and multi-image producer for local television stations, theatrical companies, and others. She has held the job titles of Location Manager Production Manager, and Producer. Bruton Ex. 1, p. 3. From January to April 1978, Ms. Bruton was a salesperson for Station WOWL-TV, Florence, Alabama.

[41] The name of the licensee was changed at some point to Bruton Broadcast Communications, Inc. See Prairie Exs. 31 and 32.

From September 1976 to January 1978, she did local and regional sales and voice-overs, and produced and wrote commercials for Station WTWV-TV, Tupelo, Mississippi. Bruton Ex. 1, p. 4.

Diversification

331. Melanie Bruton has no other media interests. At the time of the hearing, her husband, Robert Bruton, owned all of the stock of Jefco Enterprises, Inc., licensee of Stations KDSI(AM) and KOPY(FM), Alice, Texas and Station KNGV(FM), Kingsville, Texas and was Chairman of the Board and Chief Executive Officer of those stations. Ms. Bruton represented in her written direct case exhibit that if she was awarded the construction permit for Haltom City, her husband had promised to sell his stock and resign all corporate positions and connections of any kind with Jefco and its stations. Bruton Ex. 2. On April 8, 1992 Statements of Foreclosure of Assets were executed with respect to the Alice and Kingsville stations (Prairie Exs. 31 and 32), and on April 28, 1992 applications were filed to assign the licenses to companies controlled by Mr. Bruton's major creditor, George Marti, and his daughter. Tr. 1775.

Auxiliary Power

332. Ms. Bruton's station will have and maintain auxiliary power generators in case of power outages at its studio and transmitters. Bruton Ex. 3.

Comparative Coverage

333. As reflected in the Joint Engineering Exhibit (Tr. 46), the total areas and populations each of the applicants would serve is as follows:

Applicant	Area (Sq. km)	Population (000)
Barger	7,010	2,848
Bruton	5,430	2,668
Hispanic	8,530	1,497
Madalina	7,500	3,100
O'Day	6,540	2,268
Poder	6,780	2,467
Prairie	7,070	2,014
Wolfert	7,020	2,459

334. The entire uncommon proposed coverage area already receives five or more aural services during daytime hours. At night there are two small rural areas which would receive a fifth service from Hispanic. These two areas total 38 kilometers in which 64 people reside.

CONCLUSIONS

Qualification Issues
Madalina
Site Issue

335. Madalina's proposal to erect a 405 foot tower on a site in North Richland Hills requires amending the local zoning ordinance. The power to effectuate a change in local zoning rests with the North Richland Hills City Council. The North Richland Hills Planning and Zoning Committee (Zoning Committee) comprised of members appointed to their non-paid positions by the City Council reviews zoning cases and makes recommendations on zoning matters to the City Council. The site availability issue added against Madalina was predicated on the submission of a July 11, 1991 letter signed under oath by the Chairman and other members of the Zoning Committee that approval of Madalina's proposed tower is "highly improbable." However, none of Madalina's package of proposed improvements, detailed in the findings, was presented to the Zoning Committee at the time it issued its July 11 letter. The Chairman of the Zoning Committee, James Brock, testified at the hearing that the proposed improvements would be positive factors the City would evaluate and which could possibly result in a zoning change. Further, he agreed with the city attorney that there is no reason to believe in advance that a meritorioius request for a zoning amendment to permit a radio tower would be denied. In light of Madalina's proposed improvements and Brock's revised opinion, it can not be concluded that the approval of Madalina's site is "improbable." See *Salinas Broadcasting Limited Partnership*, 5 FCC Rcd 1613 (Rev. Bd. 1990) and cases cited therein. Therefore, the site issue is resolved in Madalina's favor.

Real Party Issue

336. The test for a real party in interest is whether a third person "has an ownership interest, or will be in a position to actually or potentially control the operation of the proposed station." *Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1564 (D.C. Cir. 1988) (quoting *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974)); see also *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987). The record here demonstrates overwhelmingly that TMS presently controls Madalina and will be in a position to continue to control the operation of the proposed station. Thus, it is concluded that TMS is an undisclosed *de facto* party to Madalina's application and that Madalina is not basically qualified to become a Commission licensee. *Fenwick Island Broadcast Limited Partnership*, 7 FCC Rcd 2978, 2979 (Rev. Bd. 1992).

337. The record reveals that TMS has been deeply involved in every aspect of the preparation, filing, and prosecution of Madalina's application, has controlled the financing, and has participated extensively in the decision making. TMS's involvement began when TMS's full time Director of Engineering, Marvin Fiedler, brought the Haltom City allotment to the attention of Tichenor, Jr. and Castillo, and prepared a plot of theoretical contours for the station. Fiedler's memo concluded that the station would serve Dallas and be a good service for Ft. Worth. It was only after discussing the possibility of applying for the Haltom City allotment with Tichenor that Castillo decided to apply for the station with his wife. Fiedler's and TMS's involvement did not end there. Among other things, Fiedler participated with Castillo in the decision to retain the Jules Cohen engineering firm as Madalina's engineer; travelled on three occasions from San Antonio to Dallas to assist in locating a site for Madalina; assisted Jules Cohen in preparation of the technical portions of the application; contacted the FAA on Madalina's behalf regarding an acceptable location of Madalina's site; worked with the FAA and Jules Cohen, after the application was filed, to resolve EMI concerns and subsequently prepared a new contour map for reduced height to respond to FAA concerns; and worked with Castillo, both before and after Madalina's application was filed, on estimates of construction and

operating costs. Throughout the many months that Fiedler assisted Castillo, he received no pay from Madalina for these efforts. TMS paid Fiedler to perform these services and his work was done during TMS work hours.

338. Likewise, other TMS employees performed extensive services for or on behalf of Madalina during TMS work hours. For example, TMS employees helped with the budget, arranged for publication of the local public notice, typed correspondence regarding Madalina's public file and even prepared Madalina's Texas State Franchise tax returns. In fact, of the ten persons employed at TMS's Dallas headquarters, eight performed some services for Madalina. As was the case with Fiedler, none of these TMS employees were paid by Madalina for their services. The level and continuity of involvement of TMS employees in Madalina's application strongly demonstrates that the Haltom City application is a company project. Tichenor seeks to justify the heavy involvement of TMS employees on the ground that it would keep Castillo from spending time on Madalina business. Tichenor's post-hoc rationalization is not credible. It does not explain TMS's willingness to provide the services of its employees free of charge. Moreover, Madalina does have another 50% shareholder, Madaline Castillo, who claims she will work as Madalina's operations manager. Surely, Mrs. Castillo, who is not employed, could have retained outside consultants or even performed many services herself, so as not to involve TMS employees. Her total lack of involvement in the preparation and prosecution of Madalina's application buttresses the conclusion that the Haltom City application was and is a company project.

339. Madalina's use of outside professionals with ties to TMS provides further evidence of TMS' real party in interest status. Madalina has utilized TMS' corporate counsel, Bruce Haller, to prepare its corporate papers, help with site acquisition and advise it regarding its fee dispute with its current communications counsel notwithstanding Haller's making clear to Castillo that he would represent TMS if a conflict arose between TMS and Madalina. Also, Madalina utilized, initially, TMS' FCC counsel and its current counsel represent a TMS affiliate. Further, it is utilizing the engineering firm recommended by Fiedler in conjunction with TMS' FCC counsel.

340. The most obvious--and effective--method by which TMS has ensured its control over Madalina's application was by formally becoming its financier. As the Commission has oftentimes acknowledged, "... while supplying the major source of financing does not necessarily cause a third party to become a real-part-in-interest...'[i]t is well known that one of the most powerful and effective methods of control on any business, organization, or institution, and one of the most potent causes of involuntary assignment of its interests, is the control of finances.'" *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974) (*citations omitted*). Significantly, the TMS/Madalina funding agreement gives TMS the right to provide all of Madalina's funding and to convert its debt into as much as 80% of Madalina's equity. Tichenor confirmed that TMS intends to obtain 80% of Madalina's stock. Moreover, the terms of the loan agreement, which was prepared by TMS's attorney, Bruce Hallet, evidence no "arms length" lending relationship but, as Tichenor described it, a financial risk equivalent to that of an equity holder. Madalina's explanation for turning to TMS for financing in January 1990 itself raises a question whether the financing arrangement was merely another method to cement the control TMS has exhibited since the inception of Madalina's application. For while Castillo maintains he sought another fundings source so as to avoid giving up as much as 50% equity to MESBIC, the TMS deal requires a much greater relinquishment of ownership, up to 80%. Moreover, Castillo's further explanation, that he wanted to use a "local bank," also was not satisfied by the TMS financing agreement.

341. The terms of the TMS loan indicate that TMS's advances are truly capital investments in Madalina's application. First, and most conspicuously, TMS does not require personal guarantees from the Castillos, despite the fact TMS acknowledges Madalina has no assets and, if it does not win the construction permit, repayment is not probable. Although TMS points to two other instances where it has made loans without personal guarantees, there is no evidence that those businesses, a station and a food manufacturing business, would not, at a minimum, have physical equipment to utilize as collateral in the event the loan was not repaid. Madalina, however, has no assets whatsoever. Thus, by providing up to a half-million dollars toward prosecution of Madalina's application, TMS is investing only in an opportunity for business, not in a business itself. Also indicative of the fact that the TMS advances are not *bona bona* loans, TMS has not required that even interest be paid before action on Madalina's application. Indeed, TMS had not even bothered to calculate the interest due on its loan to Madalina until shortly before the May 1992 hearing, and only after that inaction was questioned during discovery. Moreover, TMS has never specifically identified the Madalina loan in any report to its principals or lenders, nor has it included the interest due in its general receivables accounting, since TMS's auditor was never told to do so. Furthermore, TMS has refused to formally document its advances to Madalina through promissory notes or other legal documents.

342. TMS's handling of Madalina's requests for funds best illustrates who currently controls Madalina's affairs, and who will control them in the future. Whenever Madalina receives a bill, it must ask Tichenor for the funds to pay it. Tichenor then reviews the expense Madalina wants paid to determine whether TMS will provide the necessary funds. Whenever Tichenor decides Madalina's prospects are beginning to look dim, he can cut-off Madalina's money. Already, TMS has made several "calls" as to prosecution of Madalina's application, including initially cutting-off funds when the site issue was specified against Madalina, deciding to advance the funds necessary to allow Madalina to participate in the February 1992 hearing and then deciding to fund prosecution of the real-party issue. If Madalina's application is denied in the initial decision, TMS will decide whether to fund Madalina's appeal. There is nothing to indicate TMS's control over Madalina's affairs will not continue when the station becomes operational; indeed, Tichenor expects Castillo to continue his present procedure of discussing expenditures after the station is built. The loan letter that governs disbursements to Madalina is the same document which will govern disbursements for construction and operating expenses, should Madalina prevail and as expected, call on TMS for further financing.

343. Finally, although TMS claims disinterest in the Dallas/Ft. Worth market as counter to its official policy of concentrating on top-ten U.S./Hispanic markets, several facts indicate TMS does have an interest in that market. First, it is not clear tht Dallas is outside the top-ten ranking or that TMS believes it is. An SRDS survey with a TMS

ad on the cover discovered by a competing applicant, ranks Dallas/Ft. Worth as the number 9 Hispanic market. In this connection, it is not credible that Tichenor, who claims to keep tabs on what the top-ten Hispanic markets are, is unaware that at least some sources consider Dallas/Ft. Worth to be within that top-ten ranking. Furthermore, the fact that both TMS's chief engineer and its FCC counsel assumed TMS would have an interest in the Dallas/Ft. Worth market and rushed to advise Mac Tichenor about the Haltom City allotment is indicative of TMS's interest. And the fact TMS is already operating Spanish-language stations in the top-four Hispanic markets in Texas and has a financial stake in a Spanish-language programming network also make it not surprising that TMS would desire an interest in Madalina's proposed Haltom City Spanish-language station.

344. In sum, the record reveals TMS has actively participated in Madalina's application through the direct involvement of its employees, through utilizing common consultants, through control of Madalina's purse strings, and otherwise. Moreover, TMS has demonstrated an interest in the Dallas/Ft. Worth market. All objective indicators lead to the inescapable conclusion that TMS is an undisclosed *de facto* party to Madalina's application, and that Madalina is not basically qualified to become a Commission licensee. *Fenwick Island, supra.*

Poder

Site Issue

345. Poder's proposed transmitter site extends onto three parcels of land. Parcel 1, where Poder's tower base and northern guy wire anchor will be located is owned by the Union Pacific Railroad and leased by the railroad to Yates. Yates subleased this property in October 1987 to KBS which operates a lumber yard at the site. Parcel 2, which will accommodate Poder's southern guy wire anchor, is also owned by the Union Pacific. The third parcel was owned by Yates and leased to KBS until July 10, 1992, when Yates sold the parcel to 201, a corporation owned by KBS stockholders. Poder's reasonable assurance of site availability is based on lease agreements entered into in August 1989 between KBS and Spellman who had applied to the FCC to drop in the Haltom City frequency. With the approval of KBS principal, Keith, and Yates, Spellman assigned his rights under the lease agreements to Poder.

346. Poder had reasonable assurance as to the availability of the third parcel when it filed its application in September 1989 in light of Keith's discussion with Yates which has not been refuted. However, neither Spellman nor a Poder principal contacted Union Pacific to secure its approval for use of Parcels 1 and 2. In this regard, Poder concedes in its findings (149) that Keith informed Spellman that the property on which he wanted to construct the tower was owned by Union Pacific.[42] Poder's claim of reasonable assurance of the availability of Parcels 1 and 2 rests on the approval of KBS, the sub-lessee. In this connection, Keith was under the mistaken belief that Parcel 2 was covered under the Yates lease with Union Pacific and, thus, was included in the Yates sublease to KBS. In fact, Parcel 2 had not been leased to Yates or anyone else. Poder asserts that it did not contact Union Pacific for two reasons. First, it relies on Keith's belief, imparted to Spellman, that while construction of the proposed tower required the railroad's prior approval, it would be premature to request approval until Poder was ready to construct the tower and Keith did not anticipate a problem in obtaining Union Pacific's approval at the appropriate time.[43] Second, Poder claims that it was precluded from contacting Union Pacific by the August 21, 1989 addendum between Spellman and KBS which was assigned to Poder. In this regard, Garza testified that he interpreted paragraph 15 of the Addendum to mean that Poder as prohibited from jeopardizing the lease agreement betwen KBS and Union Pacific, and that by contacting the railroad, Poder would be interfering with KBS's lease (see finding 125).

347. In order to satisfy the Commission's requirements, an applicant must show that he has "contacted the property owner or owner's agent and has obtained reasonable assurance in good faith that the proposed site will be available for the intended purpose." *Port Huron Family Radio, Inc.*, 4 FCC Rcd 2532, 2534-2535 (Rev. Bd. 1989) quoting the Commission's *Order (In the Matter of Amendment of Section 73.3572 and 73.3573 Relating to Processing of FM and TV Broadcast Applications)* 58 RR 2d 776, 782 (1985); see also *National Innovative Programming Network, Inc., Of The East Coast*, 2 FCC Rcd 5641, 5643 (1987); *Elijah Broadcasting Corporation*, 5 FCC Rcd 5350, 5351 (1990). Poder's showing is deficient since neither Spellman or Poder's principals contacted Union Pacific prior to certifying the availability of Poder's site and Keith, the man Spellman dealt with, was not an agent of Union Pacific. Consequently, Poder failed to establish that it had reasonable assurance of the availability of its proposed site and Poder is not qualified to be a Commission licensee. Further, Poder's assertion that it acted in good faith in failing to contact the property owner (even if accepted)[44] would be

[42] As discussed in findings 123 and 124, *supra*, Garza's unsupported claim that he understood that KBS owned part of the property required for Poder's proposed site is not credible.

[43] Garza, Poder's principal, did not speak to Keith. Garza claims that he relied on Spellman's assurances that based on his discussion with Keith, there would be no problem in getting the approval of the railroad. Tr. 2968-2969. Spellman did not testify at the hearing.

[44] Poder's explanations for not contacting Union Pacific are not persuasive. In light of the Commission's requirements, it was incumbent on Poder to get the permission of Union Pacific prior to specifying the site notwithstanding the belief of Spellman or Keith that Union Pacific would eventually give its approval. Moreover, even if Poder was reluctant to directly contact Union Pacific, it could have requested Keith to do so. Significantly, Poder's principals never spoke to Keith or anyone else at KBS about obtaining approval of the railroad. Poder's failure to speak to Keith is inexplicable. Further, paragraph 15 of the Addendum could not be reasonably interpreted as barring Poder from contacting Union Pacific to obtain its permission to use the leased site. The Addendum in question precludes the lessee from attempting to purchase the leased premises or interfering with the business relations between the lessor and the railroad. Clearly, contacting the railroad to determine if they were agreeable to allowing KBS to sublet the property to Poder does not run afoul of the Addendum. The assertion of Garza, a

relevant to a misrepresentation issue but has no bearing on a site availability issue. Moreover, the fact that Poder contacted Union Pacific in 1992 and secured its permission to use their property is of no consequence. The critical fact is that Poder did not have the rquisite reasonable assurance at the time it filed its application. *Port Huron, supra.*[45]

O'Day

Financial Certification Issue

348. O'Day has established that it was financially qualified when it filed its application and is currently financially qualified. O'Day initially relied on a financing letter from BP&R, an investment banking firm, in the amount of $600,000. It now relies on a financing letter from CCC in the amount of $900,000.[46] CCC is also an investment banking firm. The BP&R and the CCC financing letters state on their face the conditions under which the loans will be extended, terms of repayment and collateral. Moreover, the underwriting guarantee provided by BP&R and subsequently by CCC ensures that O'Day will have the funds it requires. In addition, O'Day has submitted evidence establishing that the investment banks have available assets far in excess of the required amounts, *assuming, arguendo,* there are insufficient investors. In this connection, Alexopulos testified that he had available a base of investors who would readily participate in the financing of this venture in amounts of $600,000 to $1,000,000. In light of these facts, O'Day has demonstrated that its source of financing is a legitimate non-bank institution which can be relied on to provide the funds required. See *In the Matter of Amendment of the Commission's Rules for Rural Cellular Service,* 4 FCC Rcd 2542, 2547 (1988); see also *WBOK, Inc.,* 17 FCC 2d 844, 845 (1969). Moreover, the facts surrounding the making of the loan developed in the record and the terms of the loan specified in the financing letter comply with the standards for reasonable assurance enunciated in *Scioto Broadcasters Limited Partnership,* 5 FCC Rcd 5158 (Rev. Bd. 1990), *rev. den.* 5 FCC Rcd 5902 (1980), *recon. den.,* 6 FCC Rcd 1893 (1991). In this connection, where the qualifications of O'Day have been reviewed, adequate collateral has been demonstrated and the tentative terms have been identified and are satisfactory to both borrower and lender the Commission will not second-guess the willingness of the financial institution to make the loan. *Harrison County Broadcasting Co.,* 6 FCC 2d 5819, 5821 (Rev. Bd. 1991). Further, since O'Day's financial certification was made in good faith and there is no evidence of deception (intentional or otherwise) the misrepresenation issue is also resolved in O'Day's favor.

Bruton

Financial/Misrepresentation Issues

349. Having lost her original loan commitment, Bruton now proposes to rely on a March 5, 1992 loan letter from George W. Marti, an equipment manufacturer who has a history of advancing money to radio stations and then foreclosing on the station once the borrower defaulted.

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lawyer, to the contrary is not credible. In sum, the explanations offered by Poder appear to be *post hoc* relationalizations for the failure to contact Union Pacific.

[45] In light of this determination, it is unnecessary to reach the question whether Poder currently has reasonable assurance of the availability of its proposed site.

[46] On September 12, 1991, O'Day filed a petition for leave to amend to substitute the CCC loan commitment for the BP&R commitment. Consideration of that amendment was held in abeyance pending scrutiny of the BP&R loan commitment relied on at the time of certification. See *MO&O,* FCC 91M-3193, released November 1, 1991, paragraph 5. In light of the determination that O'Day was financially qualified at the time of certification and is currently financially qualified, the petition for leave to amend is granted and the amendment is accepted.

However, although the loan letter has the trappings of an acceptable commitment, closer inspection reveals it to be an "accommodation" letter, insufficient to support a claim of financial qualifications.

350. In an effort to show compliance with the tenets enunciated in *Scioto, supra*, the Marti letter dutifully recites that Marti has provided the financial information provided for Mrs. Marti and her husband. It also states that Marti is familiar with Mr. Bruton's finances because he sold him interests in broadcast stations and holds promissory notes as a result of the sale. However, the evidence establishes that the sentences were inserted for cosmetic purposes, not to substantiate the financial wherewithal of the Brutons. Marti candidly admitted that he did not request the joint financial statement of the Brutons and he didn't pay any attention to it. Small wonder. The only appreciable assets shown on the balance sheets are a house owned by Mr. Bruton and the radio stations which Marti sold to Mr. Bruton. However, Mr. Bruton no longer has those assets. Marti foreclosed on the assets of the radio stations and had the stations assigned to him and his daughter after Mr. Bruton failed to make any payment on the notes and failed to pay the real estate taxes. Mr. Marti's house was also the subject of a foreclosure proceeding. The Marti letter also requires Ms. Bruton to personally guarantee repayment of the $700,000 loan. Again, the record reveals that the provision was included solely for cosmetic purposes. It is undisputed that Ms. Bruton does not have any assets to back up her guarantee. Moreover, Marti is not concerned whether Ms. Bruton has any resources to support her guarantee because if Ms. Bruton defaults, which appears to be a certainty, he will foreclose on the station and sell it for a profit.

351. The Commission has made clear it will not second guess the wisdom of a decision to extend a loan where the Sciotti tenets are complied with in good faith. *Harrison County, supra*. That is not the case here. Unlike the situation in *Harrison County*, Marti did not review Ms. Bruton's individual qualifications and Ms. Bruton did not demonstrate adequate collateral to Marti. The record compels the conclusion that the Marti letter was purely an "accommodation" and nothing more. Moreover, the Marti loan can only be used for construction and three months operation of the station. Ms. Bruton testified at her April 9, 1992 deposition that funds for prosecution of her application will come from her personal funds. However, Ms. Bruton does not have any personal funds to pay the costs of prosecution. Moreover, as of the May 1992 hearing, Ms. Bruton owed her prior communications firm approximately $28,000. Also, she has to pay her current counsel and Ms. Bruton has "no idea" what those legal fees will be. Ms. Bruton's failure to satisfactorily demonstrate the means to meet prior, current and future prosecution expenses provides a separate ground for her disqualification on financial grounds. See *Weyburn Broadcasting Ltd. Partnership v. FCC*, 71 RR 2d 1386, 1391-1393 (D.C. Cir. 1993).

352. Turning to the misrepresentation issue, at the May 1992 hearing, Ms. Bruton was asked a straightforward question. She was asked whether she would put any of her own money into the construction and first three months' operation of her proposed station. She replied: "I haven't decided that. I have enough funds set aside for that." Ms. Bruton's testimony must be given its logical and reasonable meaning: she had not decided whether she would use her own funds but she had enough of her own funds set aside to finance station costs. Ms. Bruton was then shown a copy of the Brutons' joint financial statement and conceded that the financial statement did not show funds set aside for Haltom City. She responded: "Not specifically, no." However, she did not retract her earlier testimony either at that juncture or in her subsequent testimony. Instead, she has resorted to repeated untruths and candorless testimony in a futile attempt to explain away her damaging statement. Rather than exculpating herself, Ms. Bruton became more deeply ensnared in the web of deceit.

353. In seeking a misrepresentation issue against Bruton, Prairie urged that Ms. Bruton's testimony that she had personal funds "set aside" for the station had to be false in light of the Brutons' precarious financial state exemplified by their inability to pay a department store bill in the amount of $1,868.28. However, instead of admitting, even at that juncture, that her May 1992 testimony was erroneous, Ms. Bruton resorted to evasion and a lack of candor. Ms. Bruton's January 17, 1993 declaration contained no explanation of her May 1992 hearing testimony. Her response was to maintain financial independence from her husband. Ms. Bruton later claimed that this assertion of financial independence was made only to rebut the suggestion that she was somehow responsible for the amounts owed on the department store account held by her husband. Ms. Bruton's claim is a further example of her unwillingness to be truthful with the Commission since her declaration does not limit her testimony in such a way and was presumably intended to rebut Prairie's allegations concerning Ms. Bruton's "set aside" testimony. Following the addition of a misrepresentation issue and confronted by discovery requests, Ms. Bruton was forced to admit that her testimony that she had funds set aside for the station was not truthful. However, even at this late stage, she refused to be candid with the Commission. Instead, in late February 1993, she advanced, for the first time, the incredible assertion that the "funds set aside" testimony at the May 1992 hearing referred to the Marti loan, not her own funds. As reflected in the record, Ms. Bruton's litany of deceit continued at the May 3, 1993 hearing where she clung to her explanation of the "funds set aside" testimony. Also, she was unwilling to be forthcoming when confronted with her failure to proffer that interpretation prior to her February 1993 declaration. The record compels the conclusion that Ms. Bruton is unfit to be a Commission licensee and her disqualification is mandatory.

Comparative Issue
Best Practicable Service
Comparative Coverage

354. Where the areas and populations within the applicants proposed coverage areas are aleady well-served, the Commission has awarded a slight coverage preference only to those applicants proposing substantially greater overall coverage than their competitors. See *Simon Geller*, 90 FCC 2d 250, 268-269, 276 (1982), where a slight preference was awarded to an applicant proposing to serve four times more area and 315,000 more people than his competitor. For less significant differences, a very slight preference has been awarded. *See, e.g., Barton Broadcasting Co.*, 104 FCC 2d 785, 791 (Rev. Bd. 1986), where a very slight preference was awarded to an applicant proposing to serve 44,215 or 27% more people. Where the differences are insignificant, no preference is awarded. *See, e.g., Susan Mulkey*, 4 FCC Rcd 5520, 5521 (1989), where no preference was awarded to an applicant proposing to serve 36,206 or 2% more people.

355. Here, Madalina deserves a very slight comparative preference over each of the other applicants except Barger and Bruton for its proposed provision of service to 3,100,000 people. In turn, Barger, Bruton, Poder, Wolfert, Prarie and O'Day should each receive a very slight preference over Hispanic. Hispanic's provision of a fifth service at night to 64 persons is too insignificant to warrant consideration in the comparative analysis.

Integration[47]
Quantitative

356. Prairie receives 100% full time quantitative credit. The record reflects that the sole voting shareholder, Glenn, has been in total control of every aspect of Prairie's application filing and prosecution. The sole non voting stockholder, Caballero, who lives in New York City, has played no role in the preparation or prosecution of the application. She has been a passive owner and the record requires the conclusion that she will maintain her passive role in the event of grant of Prairie's application. Glenn hired Prairie's attorneys and engineers, negotiated with her tower site owners, prepared Prairie's Articles of Incorporation, and prepared and signed Prairie's application. Glenn also preformed all the tasks associated with the filing and prosecution of a 301 application. Moreover, Glenn has matched her controlling actions with a full personal investment in the corporation by contributing funds in proportion to her 51% equity interest in Prairie. Also, Glenn has timely pledged to sever all connections with her present employer and will therefore have no difficulty devoting full-time to the proposed radio station. Moreover, the fact that Glenn's husband has assisted her in very minor respects does not provide a basis for reducing Glenn's integration credit. See *Oliver Kelley and Mary Ann Kelley,*, 6 FCC Rcd 7377 (Rev. Bd. 1991); *Sound Broadcasting Co.*, 6 FCC 3626, 3628 (Rev. Bd. 1991). Glenn's integration proposal is enhanced by her 30 years residence within the service area and her involvement in civic affairs. Prairie receives substantial credit under the unified local residence/civic activities criterion. Prairie also receives slight to moderate credit for her past broadcast experience.

357. Wolfert seeks 100% full-time integration credit for its proposal to integrate one of its 50% partners, Jonathan Wolfert, as its station manager and its other 50% partner, Mary Lyn Wolfert, as its general manager. No integration credit will be awarded. Applicants have the burden of proof in establishing how they will effectuate their integration proposals. Thus, any applicant with other business interests must set forth his integration proposal "in some detail" and "specifically allocate" how his time will be spent so as to accommodate his other interests while effectuating his broadcast proposal. *Pentecostal Revival Association, Inc.*, 1 FCC Rcd 842 (Rev. Bd. 1986); *see Kennebec Valley Television, Inc., supra.* ("It is clear beyond peradventure that disposition of current employment is an essential element of a complete ownership integration proposal.") Applicants which have failed to meet their burden of showing specifically and persuasively how a proposed full-time position can be effectuated despite other significant commitments elsewhere will not be given full-time integration credit. *Kennebec Valley Television, Inc., supra,* 2 FCC Rcd at 1241; *Stanley Group Broadcasting, Inc.*, 3 FCC Rcd 5017, 5020-5021 (Rev. Bd. 1988). Here, it is not credible that Jonathan Wolfert, who (a) is currently involved in every aspect of JAM's business as its top manager; (b) will continue to receive his sole income from JAM,[48] (c) will continue to work at the JAM facililty and to supervise JAM employees, both as to station business and also, in part, on JAM business;[49] and (d) has not established any schedule or other specific plan by which to implement his complex proposal for JAM employees' assumption of additional duties; will segregate his functions and shift enough of his current responsibilities so as to ensure that 40 hours of his work week are devoted exclusively to station man-

[47] Madalina, Poder and Bruton have been disqualified. Assuming they are found qualified, a brief integration analysis is provided. *Madalina* receives, at most, 10% quantitative credit. TMS's option to convert its loan to nonvoting stock must be considered exercised and TMS treated as an 80% shareholder since Tichenor has made clear that TMS will exercise its option. See *Emision de Radio Balmeseda, Inc.*, 7 FCC Rcd 3852 (Rev. Bd. 1992). In addition, in light of TMS's extensive involvement in Madalina's affairs, TMS is not passive and its 80% interest must be figured in the integration analysis. Further, Ms. Castillo receives no integration credit in light of her complete lack of knowledge about and her passivity concerning virtually every significant aspect of Madalina's application. See *Atlanta City Community Broadcasting, Inc.*, (FCC 93-335), released July 9, 1993, paragraph 17. Mr. Castillo's 10% interest is enhanced by his local residence/civic activities, minority status and broadcast experience. *Poder* receives 100% full-time quantitative credit. Poder's three active principals have all participated in Poder's affairs and no evidence has been adduced showing they will not effectuate their integration proposals. Further, Q-Prime's interest in Poder is passive and the evidence establishes it will remain so. Poder's 100% quantitative credit is enhanced by 100% minority enhancement, 100% local residence/civic involvement (Rubio has no civic involvement), and slight broadcast experience for Garza. *Bruton* also receives 100% quantitative credit coupled with local residence/civic involvement and limited broadcast experience enhancement.

[48] For the first three months, Wolfert will not pay any station employees, including Jonathan and Mary Lyn Wolfert, except for a receptionist. The only source of income for all JAM employees who will work on station matters will continue to be JAM.

[49] He will continue to oversee some production, creative and sales employees.

agement. Since Wolfert has failed to demonstrate that his proposal can be effectuated, Jonathan Wolfert's integration proposal cannot be credited.

358. In addition, Ms. Wolfert's passive role in Wolfert's application and her history as a lower-level manager and bookkeeper at JAM strongly predict she would not function as the general manager of Wolfert's station; there is nothing in the record to suggest otherwise. Wolfert's plan to keep Ms. Wolfert at the Haltom City "main studio" offers further confirmation that would be so. While Wolfert claims Ms. Wolfert will hire and supervise all department heads, develop all station policies, and supervise public service programs, among other duties, it also proposes to station her at a "main" studio which will likely originate no programming and have no programming personnel. Indeed, the plan is for virtually all station functions, except sales and bookkeeping, to be performed at the JAM "auxiliary" studio which Mr. Wolfert will run. Thus, Ms. Wolfert, the nominal general manager, will be stationed 45 mimutes away from the JAM studio where all or most programming will originate, traffic will be done, production will occur, creative air and production staffs will be located, and 40% of the administrative work will be performed. The only personel to be stationed at the Haltom City "main" studio would be commissioned sales people and one secretary/receptionist.[50] Mr. Wolfert will supervise all other employees.[51] The record as a whole belies Wolfert's claim that Mary Lyn Wolfert will function as the station's top manager. Even assuming she would change her lifestyle and begin working full-time, the duties she would perform would not be those of a general manager. Stationed far from the hub of station operations with a minimal staff, with her record of passivity in the prosecution of Wolfert's application, and with her history of working in a non-management or lower-management role for JAM, it must be concluded that Wolfert has not demonstrated its plan for Ms. Wolfert to be general manager of the Haltom City station is credible. Thus, no credit for her integration pledge may be given. *See, e.g., Utah Television Associates,* 102 FCC 2d 1470, 1478-1479 (Rev. Bd. 1985); *Jarad Broadcasting Co., Inc.,* 1 FCC Rcd 181, 183-184 (Rev. Bd. 1986).

359. Hispanic receives 100% quantitative credit. At the time of the November 1991 hearing, Hispanic's proposed integrated principals consisted of Marcus Rodriguez, Sr. (60%), Alicia Esparza (20%) and Dalia Boatright (20%). Rodriguez, Sr. died on February 15, 1992 and was replaced by his son, Rodriguez, Jr. Commission precedent holds that an applicant substituting a new principal for one who died may maintain, but not increase, the integration credit which would have been due that applicant. *See, e.g., Carta Corporation,* 5 FCC Rcd 3696, 3702 (Rev. Bd. 1990). Rodriguez, Sr. was proposed as full-time general manager, a clearly recognized management position. Hispanic's opponents urge, however, that Rodriguez, Sr.'s health cast doubt on his ability to effectuate full-time employment. It is true that Rodriguez, Sr. had heart bypass surgery in 1983. Also, he suffered a stroke in 1987 which partially affected his motor abilities. It is also true, however, that he had not suffered a reoccurence of either illness prior to his sudden demise on February 15, 1992. Further, neither his heart problem nor the stroke restricted his full and active participation in business activities. Thus, in 1986, prior to his stroke, Rodriguez, Sr. attempted to retire. However, shortly thereafter, he realized it was a mistake. In 1987, he purchased KSSA AM/FM and worked as President/General Manager. After relinquishing the helm of those stations, he worked part-time on special projects while waiting for a determination in this proceeding. In this connection, Hispanic's opponents take the contradictory position that the integration commitments of Hispanic's two other principals (Esparza and Boatright) should be discounted on the ground that Rodriguez, Sr. was the prime mover in the prosecution of Hispanic's application. In sum, there is no reason on the basis of this record to conclude that Rodriguez, Sr. was physically incapable of effectuating his proposed full-time commitment. Also, it is concluded that Rodriguez, Jr., who is now the proposed general manager, is entitled to the 60% quantitative credit which his father would have received. There is no bar to his effectuating his promise to integration since he has pledged to terminate his current employment.

360. Further, Esparza and Boatright will receive 40% integration credit. Both will serve full-time in recognized management level positions and be involved in policy making decisions. The fact that Rodriguez, Sr., the majority stockholder, was more active in the prosecution of Hispanic's application does not preclude credit where, as here, Esparza and Boatright play true and actual roles in management. See *Vela Broadcasting Co.,* 2 FCC Rcd 3663, 3667 (Rev. Bd. 1987); see also *McClenahan Broadcasting, Inc.,* 5 FCC Rcd 7269, 7272 (Rev. Bd. 1990). Hispanic receives 100% substantial minority enhancement. Also, Rodriguez, Jr. receives credit for long-term service area residence/civic activities. Contrary to the assertions of Hispanic's opponents, the civic activities of Rodriguez, Sr. and Jr. are sufficiently detailed to allow civic activity credit. Rodriguez, Jr. receives no broadcast experience credit since Hispanic's amendment setting forth Rodriguez, Jr.'s integration proposal did not include his broadcast experience. Esparza receives credit for six years residence/civic involvement and substantial broadcast experience. Also, Boatright receives credit for 18 years residence in the service area/civic involvement and 16 years of broadcast experience.

361. O'Day seeks integration credit for the proposed integration of Anna O'Day, its general partner and owner of 15% of O'Day's equity. No integration credit will be awarded. O'Day was specifically required to set forth in its application (FCC Form 301 revised in 1989) Anna O'Day's integrated position and a description of her duties, a fact it was aware of when filing its application. *See* O'Day application, Exhibit III, official notice taken, stating that O'Day "has yet to determine the General Partner's level of integration" and would file its integration statement before the amendment-as-of-right period. Thus, O'Day was clearly bound by the description of its proposal as it was set forth on the "B" cut-off date. And since the application, as of that date, did not list Ms. O'Day's proposed position or her duties, O'Day's attempt to fill in the fatal gaps after the

[50] Moreover, Ms. Wolfert will not even gather local news and arrange for interviews with Haltom City residents; the secretary will perform those duties.

[51] The fact Wolfert's budget allocates only three items specifically for the main studio -- $2,550 for the receptionist's salary, $2,000 for equipment rental, and $900 for studio rent is indicative of how much significance Wolfert places on the Haltom City facility.

cut-off date is an attempt to gain an improper comparative upgrade. O'Day's citation to *Sarasota-Charlotte Broadcasting Corp.*, 976 F.2d 1439 (D.C. Cir. 1992) does not help its cause. The holding in *Sarasota* did not address applications such as O'Day's where O'Day was specifically required to set forth Ms. O'Day's integrated position and a description of her duties. Furthermore, the Court's holding is fatal to O'Day in light of the Court's conclusion that "[W]e do not question the legitimacy of the FCC's policy of strictly disallowing post cut-off date changes in an applicant's comparative showing...." 976 F.2d at 1442-1443. Moreover, while the title may not be determination of credit, as O'Day maintains, the functions are, as O'Day concedes. Here, O'Day did not reveal what management functions Ms. O'Day would have until well after the cut-off date. Further, unlike the applicant principal in *Sarasota*, who was already the top manager of an existing station which initially would be co-owned with the FM sought, there is no presumed continuity of top management here. Ms. O'Day was recruited into this applicant by people who had never before met her to form a new entity whose sole purpose is to apply for this station. In fact, Ms. O'Day's level of integration was undecided as revealed by O'Day's application.[52]

362. Also, O'Day may not receive credit because it is not a legitimate two-tiered applicant. The moving forces behind O'Day are Craig Siebert and Joan Leanos, its limited partners. Anna O'Day, its putative general partner is merely a foil to obtain the Haltom City construction permit. O'Day bears many of the telltale indicia of illegitimacy discussed in *Fresno FM Limited Partnership*, 6 FCC Rcd 6998 (1991) and cases cited therein. As in those cases, the limited partnership was formed here in a relatively casual manner by virtual strangers who made little effort to investigate each other's background. Ms. O'Day was recruited by limited partners Craig Siebert and Joan Leanos because of her comparative attributes, particularly her status as a Hispanic female. Joan Leanos, who was referred to Ms. O'Day by two women she had never met before, did not "check out" Ms. O'Day with any other sources. Nor did she discuss with Ms. O'Day her financial resources until long after the application was filed. Ms. Leanos interest in Ms. O'Day's financial resources first peaked in March 1991, when Ms. O'Day was again unemployed and borrowed $750 from Ms. Leanos. Also, Craig Siebert, who had put $25,000 into the application as of February, 1992, never saw a resume or financial statement for Ms. O'Day, never did a credit or reference check on her, does not know how Ms. Leanos initially found Ms. O'Day, and all he knew about Ms. O'Day is that she is a minority female from Dallas with broadcast experience.

363. The heavy hand of O'Day's limited partners is evident in other ways. It was the limited partners who chose O'Day's communications law firm, with whom Craig Siebert is associated, and which has represented Craig Siebert in many other applications in which he has had an interest. That firm guided Ms. O'Day throught the application process, even overseeing telephone calls made from their office to various consultants and others regarding O'Day's application. It also drafted the limited partnership agreement. The close connection between Craig Siebert and the Bessozi law firm is particularly evident from the fact that the firm is taking the unusual step of working on a contingency basis, as it has for other Craig Siebert communications projects. It was also Joan Leanos who recommended that Ms. O'Day utilize her cousin, Jeffrey Alexopulos, to obtain a financing letter for the Haltom City application. Additionally, the limited partners essentailly decided the format the applicant would take. The two-tiered structure is consistent with the format Craig Seibert has used with other broadcast applications, wherein he has been a "passive" investor holder with approximately 80% of the equity, and the general partner generally has been a local female. Additionally, there is a substantial question whether Ms. O'Day has a financial stake in the application. Although O'Day baldly asserts that Ms. O'Day has contributed $3000-$4000 to O'Day, it has not documented any contributions made by her to the company. In this connection, no contributions from Ms. O'Day is evident in the checks produced by O'Day for the period September 1989-February 1992. Therefore, viewing the record as a whole, it must be concluded that O'Day is not a legitimate applicant and that no credit may be allowed for her integration proposal. *Fresno, supra.*

364. Barger seeks and receives, no integration credit.[53]

Auxiliary Power

365. All the applicants propose auxiliary power and are accorded slight credit for their proposals.

Diversification

366. Barger is assessed a moderate diversification demerit based on his interests in the Floresville and Pearsall, Texas broadcast stations. Although neither Madalina nor its two voting stockholders have any attributable media interests, TMS, an active participant in Madalina's application, has significant interests in 13 radio stations, including five in the state of Texas. Madalina is assessed a substantial diversificaiton demerit. None of the remaining applicants receive a diversification demerit. Contrary to the assertions of Hispanic's opponents, Rodriguez, Jr. has committed unequivocally and unconditionally to divest himself of all media ownership and all other employment. The caveat that the divestiture would be made only if Hispanic prevails in the comparative proceeding does not make the timely divestiture commitment unacceptable.

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[52] The instant fact situation may also be distinquished from the facts in the Presiding Judge's initial decision in *Sun Over Jupiter Broadcasting, Inc.*, FCC 93D-09, relesed April 2, 1993. There, unlike the two-tiered applicant here, the applicant, an individual, was the sole principal and there was no doubt that he would manage the station.

[53] Barger vehemently criticizes the use of the integration criterion in selecting the winning applicant in this proceeding. The problem with Barger's argument is that he has taken a radically different approach in the Round Rock, Texas case (MM Docket No. 90-608) where he is proposing to be integrated into the operation of his proposed station. In that case, where he proposes to work full-time as the general manager of the station, he claims entitlement to 100% integration credit. Barger is strangely silent as to why the integration criterion is permissible in Round Rock but not in the Haltom City proceeding. Apparently, the integration criterion is arbitrary and capricious (See Barger Findings, p. 49-50) only in cases where Brager is not eligible for integration credit.

Comparative Summary

367. Prairie and Hispanic are the only two applicants with 100% quantitative integration credit. Also, they suffer no diversification demerit. As between Prairie and Hispanic, Hispanic's qualitative enhancements are superior. Hispanic's substantial minority ownership (100%), credit for local residence/civic participation and broadcast experience outweigh Prairie's credit for local residence/civic participation, broadcast experience and a very slight comparative coverage preference. Therefore, Hispanic's application is granted.

Accordingly, IT IS ORDERED, That the "Petition For Leave To Amend" filed September 12, 1991 by O'Day Broadcasting, Ltd. IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[54] the application of Hispanic Coalition, Inc. for a construction permit for a New FM Station on Channel 227C2 in Haltom City, Texas IS GRANTED; and the applications of Madalina Broadcasting, Inc., Poder Broadcasting, Inc., Prairie Broadcasting, Inc., Jonathan and Mary Lyn Wolfert, A General Partnership, O'Day Broadcasting, Ltd., John W. Barger, and Melanie Bruton ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge
Federal Communications Commission

[54] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant ot Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-115

In the Matter of

Policies and Rules Concerning
Local Exchange Carrier Validation
and Billing Information for Joint
Use Calling Cards

Reconsideration and
Petitions for Stay

ORDER

Adopted: August 4, 1993; Released: August 5, 1993

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. On June 9, 1993, the Commission released the *BNA Order*,[1] requiring local exchange carriers (LECs) to file tariffs for the provision of billing name and address information (BNA) to telecommunications service providers. The Commission also adopted several safeguards protecting the privacy interests of end users. Specifically, the Commission required LECs to notify all their end users that their BNA may be released to telecommunications service providers when (1) the subscriber uses a LEC joint use card; or (2) the subscriber accepts a third party or collect call.[2] In addition to this notification requirement, the Commission also required LECs to obtain a one-time written authorization for BNA disclosure from existing and future LEC cardholders having nonpublished or unlisted numbers. For calling card calls, LECs were not permitted to release the BNA of any end user with an unlisted or nonpublished number until the LECs obtained written authorization to do so from the subscriber. The LECs were instructed to modify their line information database (LIDB) records to generate a "deny" response when queried about cards held by such end users who have not authorized release of their BNA.[3]

2. LECs were given 60 days from the release date of the Order, or August 9, 1993, to provide all their customers notification that their BNA information may be disclosed to telecommunications service providers for billing purposes, and to obtain authorization for BNA disclosure when their customers with unlisted or nonpublished numbers made calling card calls.[4] LECs were also required to file tariffs for the provision of BNA within 90 days of the release date of the Order, or September 8, 1993.[5] Upon further consideration, we have concluded that carriers may require additional time to comply with the notification requirements. Carriers may also require additional time to develop administrative mechanisms for handling letters of authorization. Additional time will also enable carriers to ensure that their customers having nonpublished or unlisted numbers understand their choices and have fully considered their decisions regarding disclosure of their BNA information.

3. Therefore, pursuant to Section 1.108 of our Rules, 47 CFR § 1.108, we will reconsider on our own motion the deadlines we established in the *BNA Order*.[6] LECs will now be given until February 9, 1994, to provide notification and obtain authorization from their customers with nonpublished or unlisted telephone numbers for disclosure of their BNA information to interstate service providers. LECs are also required to file tariffs for the provision of the BNA information of calling card customers with nonpublished or unlisted telephone numbers no later than February 9, 1994, on 45 days' notice. Finally, we extend the deadline for providing notification to customers with listed telephone numbers to October 24, 1993, the date LEC tariffs providing BNA are scheduled to take effect. We believe these revisions should give carriers sufficient time to provide notification and obtain authorization from their customers, and should give end users an adequate opportunity to weigh their options regarding disclosure of their BNA information. However, we see no need at this time to modify the September 8, 1993 date for filing tariffs for the provision of BNA associated with customers who have listed telephone numbers.

II. PETITIONS FOR STAY

4. On July 2, 1993, the United States Telephone Association (USTA) and several Bell Operating Companies (BOCs) filed a petition for stay of the *BNA Order* pending reconsideration.[7] On July 8, 1993, the United and Central Telephone Companies (United) filed a petition for limited stay of the written authorization requirement of the *BNA Order*. On July 9, 1993, GTE Service Corporation (GTE) filed a petition for stay of the authorization requirement and the notification requirement. On July 12, 1993, U.S. Intelco Networks, Inc. (Intelco) filed a petition for stay of all the requirements of the *BNA Order*. On July 9, 1993,

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[1] Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Second Report and Order, FCC 93-254, released June 9, 1993, 58 Fed. Reg. 36143 (July 6, 1993) (*BNA Order*).

[2] *BNA Order*, para. 39.

[3] *BNA Order*, para. 40.

[4] *BNA Order*, para. 46.

[5] *Id.* at para. 45.

[6] Section 1.108 authorizes the Commission to reconsider its orders on its own motion within 30 days of public notice, which in this proceeding is the date of Federal Register publication. *See* Section 1.4(b)(1) of the Commission's Rules, 47 C.F.R. § 1.4(b)(1). *See also* Section 405 of the Communications Act, 47 U.S.C. § 405.

[7] The Bell Operating Companies joining in USTA's petition for stay are the Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Southwestern Bell Telephone Company (Southwestern Bell), and US West Communications, Inc. (US West).

Sprint Communications Co. (Sprint) and Integretel, Inc. (Integretel) filed comments supporting USTA's petition for stay of the authorization requirement, but opposing stay of other requirements in the *BNA Order*.

5. Because we are changing certain of the deadlines established in the *BNA Order* as they relate to customers with nonpublished or unlisted telephone numbers, GTE's and United's petitions for stay are now moot, and USTA's and Intelco's petitions are now moot to the extent they seek stay of these requirements. For the reasons discussed below, we deny the petitions for stay of the *BNA Order* filed by USTA and Intelco to the extent they are not moot.

A. Legal Standard

6. In evaluating petitions for stay of Commission orders, we use the four-pronged test articulated in *Virginia Jobbers*.[8] The test requires a demonstration from the petitioner that: (i) the petitioner has a substantial prospect of prevailing on the merits; (ii) irreparable injury will otherwise occur, due to the unavailability of an adequate legal remedy; (iii) the threatened injury outweighs any possible injury to the opposing party; and (iv) issuing a stay will not disserve the public interest.[9]

B. Summary of Pleadings

7. USTA claims that its members would have difficulty in developing rates to recover the costs of providing BNA when the authorization and notification requirements may be reconsidered. USTA contends that failing to recover these costs would constitute irreparable harm within the meaning of *Virginia Jobbers*.[10] USTA also maintains that a stay will not harm potential customers of BNA access because they will still have available other methods of obtaining payment for their services.[11] In its comments opposing the USTA petition, Integretel argues that no irreparable harm would result from requiring the provision pursuant to tariff of the BNA of customers with published numbers and for all third party and collect calls. Integretel also maintains that a broad stay of the tariffing requirement in its entirety would permit those LECs who refuse to provide BNA to continue to do so.[12] Sprint opposes a stay of the tariffing requirement, observing that, if the *BNA Order* is modified on reconsideration, the LECs can modify their tariffs accordingly.[13]

8. Intelco maintains that a stay would be in the public interest because some customers might oppose receiving multiple bills, and speculates that it might suffer irreparable harm because some customers would be induced to switch to non-LEC calling cards.[14] In addition, Intelco asserts that compliance with the *BNA Order* might force LECs to violate certain banking regulations.[15]

C. Discussion

9. We conclude that USTA has not satisfied the conditions for stay established by *Virginia Jobbers*. In particular, USTA has not shown that its members would suffer irreparable harm. USTA maintains that its members would suffer irreparable harm if they must file tariffs and provide service at this time, because they would incur unrecoverable costs if the notification and authorization requirements are revised on reconsideration.

10. A concrete showing of irreparable harm is an essential factor in any request for stay.[16] The courts have required an exacting standard of proof on this issue, stressing that "the injury must be both certain and great.... Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur."[17] Moreover, the harm must "directly result from the action which the movant seeks to enjoin."[18] The courts have also stressed that harm, even if proven, will not necessarily justify a stay. "The key word in this consideration is *irreparable*[19] Thus, it is "well settled that economic loss does not, in and of itself, constitute irreparable harm."[20]

11. USTA has not established that any harm its members might suffer in the absence of a stay would be irreparable. The only harm USTA identifies is the cost of providing notice and obtaining disclosure authorization in order to file tariffs at this time when the requirements for such notice and authorization may change on reconsideration. But USTA has failed to demonstrate that such costs are unrecoverable. Even if they were unrecoverable, USTA has failed to establish that the economic harm that may result from failure to recover costs associated with notification and authorization would differ from the economic loss at issue in *Virginia Jobbers*. Therefore, we deny USTA's petition for stay of the BNA tariffing requirement.

12. Similarly, Intelco maintains that a stay would be in the public interest because some customers might oppose receiving multiple bills, and states that it might suffer irreparable harm because some customers would be induced to switch to non-LEC calling cards. Intelco's assertion of loss of business is speculative, and therefore does not constitute a showing a irreparable harm which would warrant stay of the *BNA Order*.[21]

13. Finally, Intelco asserts that compliance with the *BNA Order* might force LECs to violate certain banking regulations. The Commission considered and rejected this argument in the *BNA Order*.[22] Intelco has not provided any additional fact or argument that warrants disturbance of the Commission's earlier finding. Moreover, our Order stated that, if a conflict with any banking regulation should arise, parties should bring it to our attention for resolution. Intelco has failed to identify any such conflict. Therefore,

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[8] Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir 1958) (*Virginia Jobbers*). *See also* Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (*Holiday Tours*).

[9] *Virginia Jobbers*, 259 F.2d at 925.

[10] USTA Petition at 6-7.

[11] USTA Petition at 5-6.

[12] Integretel Opposition at 3.

[13] Sprint Opposition at 3.

[14] Intelco Petition at 6-7.

[15] Intelco Petition at 4-5, *citing* Regulation Z, 12 C.F.R. § 226.12(a). *See also* Truth in Lending Act, 15 U.S.C. § 1642.

[16] Reynolds Metals Co. v. FERC, 777 F.2d 760, 763 (D.C. Cir. 1985); Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (*Wisconsin Gas*).

[17] *Wisconsin Gas*, 758 F.2d at 674.

[18] *Id.*

[19] *Virginia Jobbers*, 259 F.2d at 925.

[20] *Wisconsin Gas*, 758 F.2d at 674.

[21] *See Wisconsin Gas*, 758 F.2d at 674.

[22] *See BNA Order*, para. 39 n.107.

Intelco has failed to show any irreparable injury, and accordingly, we deny its petition for stay to the extent it is not moot.

III. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and Section 1.108 of the Commission's Rules, 47 CFR § 1.108, that In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Second Report and Order, FCC 93-254, released June 9, 1993, IS MODIFIED to reflect the revisions to the deadlines established in paragraphs 45 and 46 of that Order, as specified in paragraph 3, *supra*, effective upon publication in the Federal Register.[23]

15. IT IS FURTHER ORDERED that the petition for stay filed by United States Telephone Association, Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Telecommunications, Inc., New York Telephone Company and New England Telephone and Telegraph Company, Southwestern Bell Telephone Company, and US West Communications, Inc., IS DISMISSED AS MOOT, to the extent indicated above, and otherwise IS DENIED.

16. IT IS FURTHER ORDERED that the petition for limited stay filed by United and Central Telephone Companies IS DISMISSED AS MOOT.

17. IT IS FURTHER ORDERED that the petition for limited stay filed by GTE Service Corporation IS DISMISSED AS MOOT.

18. IT IS FURTHER ORDERED that the petition for limited stay filed by U.S. Intelco Networks, Inc. IS DISMISSED AS MOOT, to the extent indicated above, and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

CURRENT DEADLINES FOR REQUIREMENTS OF BNA ORDER

1. *Notification Requirement:*
   - o *Listed:* October 24, 1993.
   - o *Unlisted and Nonpublished:* February 9, 1994.
2. *Authorization Requirement:*
   - o *Listed:* Not required.
   - o *Unlisted and Nonpublished Customers Without Calling Cards:* Not required.
   - o *Unlisted and Nonpublished Calling Card Customers:* February 9, 1994.
3. *Tariffing Requirement:*
   - o *Listed:* September 8, 1993.
   - o *Unlisted and Nonpublished:* February 9, 1994.

[23] *See* 5 U.S.C. § 553(d)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-308

In re Applications of

LINDA U. KULISKY	File No. BPH-901024MD
LYNDA F. HASKINS	File No. BPH-901025ME
GILFORD BROADCASTING COMPANY	File No. BPH-901025MF

For Construction Permit for a
New FM Station on Channel 245A in
Tavernier, Florida

ORDER

Adopted: August 25, 1993; Released: September 2, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. On August 12, 1993, the Review Board adopted its *Decision*, FCC 93R-43, affirming the *Initial Decision* of Administrative Law Judge Edward Luton, 7 FCC Rcd 3894 (1992), and the grant of Gilford Broadcasting Company's (Gilford) application for authority to construct a new FM station at Tavernier, Florida. In paragraphs 18-19 of its opinion, the Board denied a motion submitted by Gilford on July 7, 1993, styled "Petition for Special Relief."

2. Now before the Board are a "Motion to Withdraw Petition for Special Relief" and a "Reformed Motion to Withdraw Petition for Special Relief" both filed by Gilford on August 19, 1993, following the adoption but prior to release of our *Decision* dismissing the underlying petition. We therefore dismiss the instant motions as moot.

3. ACCORDINGLY, IT IS ORDERED, That the Motion to Withdraw Petition for Special Relief and the Reformed Motion to Withdraw Petition for Special Relief filed by Gilford Broadcasting Company on August 19, 1993, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-109

In the matter of

HONUS SHAIN

Licensee of Station WKLO(AM)
Danville, Kentucky

Order to Show Cause Why the License for Station WKLO(AM) Danville, Kentucky, Should Not be Revoked

ORDER

Adopted: August 26, 1993; Released: September 2, 1993

By the Chief Mass Media Bureau:

1. This proceeding began on April 21, 1993, when the Commission released its *Order to Show Cause and Hearing Designation Order*, 8 FCC Rcd 2757 (1993). The Commission ordered Honus Shain (hereinafter, "Shain") to show cause why his license for WKLO(AM), Danville, Kentucky, should not be revoked.[1] The Commission specified issues to determine whether Shain has the capacity and intent to expeditiously resume broadcast operations of WKLO(AM), and whether, Shain has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules."[2] The Commission also specified an issue to determine whether, in light of the evidence adduced pursuant to the foregoing issues, Shain possesses the requisite qualifications to remain a Commission licensee. By *Order*, FCC 93M-404, released June 25, 1993, Presiding Administrative Law Judge Edward Luton terminated the hearing proceeding because Shain failed to file the requisite notice of appearance. Pursuant to Section 1.92 of the Commission's Rules, the Judge also certified the case to the Commission.

2. Shain's last request to remain silent was granted through December 18, 1992, by letter, dated September 18, 1992, from the Chief, AM Branch, Audio Services Division, Mass Media Bureau. In that letter, Shain was advised that any future requests for authority to remain silent must be accompanied by a detailed summary of steps being taken to return WKLO(AM) to on-air operations. Shain did not request an extension of the authority to remain silent. The Commission's records indicate that WKLO(AM) has been off the air since August 18, 1989, and off the air without authority since December 18, 1992. In previous correspondence with the Commission, Shain stated that he was trying to sell the station to someone who would return it to the air. In light of the foregoing, we conclude that Shain has violated Sections 73.1740 and 73.1750 of the Commission's Rules and that Shain is not qualified to remain the licensee of Station WKLO(AM).

3. Accordingly, IT IS ORDERED, that the license of Honus Shain for WKLO(AM), Danville, Kentucky, is revoked.[3]

4. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[1] Although the Commission included a *Notice of Apparent Liability* for willful or repeated violations of Commission rules, no forfeiture is being imposed because of the action taken herein.

[2] Section 73.1740(a)(4) provides: In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

[3] The Mass Media Bureau has been given delegated authority to issue revocation orders in silent station cases. *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Roadrunner Electronics, Inc. NAL/ACCT NO. 215PO0019

ORDER

Adopted: August 26, 1993; Released: September 2, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by Roadrunner Electronics, Inc., (Petitioner/Roadrunner), pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's July 7, 1992, action finding Petitioner liable for a monetary forfeiture in the amount of $7,000 for violating Section 302 of the Communications Act of 1934 as amended, 47 U.S.C. § 302 (the Act). As explained below, we are reducing the monetary forfeiture penalty.

2. The appropriate amount of the forfeiture is $5,600.

II. BACKGROUND

3. Our records show that on November 14, 1991, an FCC inspector visited Roadrunner's place of business in Eugene, Oregon. An employee offered to sell him, for $89, a 150-watt mobile external radio frequency device (CB linear amplifier) called "The Power Source", model DDS AM-SSB.[1]

4. On July 7, 1992, the Portland Office issued Roadrunner a Notice of Apparent Liability (NAL) for violating Section 302(b) of the Communications Act and Section 2.815(b) of the FCC's Rules by marketing prohibited devices that have been banned by the FCC. 47 U.S.C. § 302(b), 47 C.F.R. § 2.815. Roadrunner responded to the NAL on July 25, 1992. Upon review of the response, the Portland Office issued Roadrunner a Notice of Forfeiture for $7,000 on August 19, 1992.

5. Roadrunner offers several reasons why it should not be subject to a monetary forfeiture penalty. According to Roadrunner, the business had changed ownership just 45 days prior to the time of the alleged offer for sale of the CB equipment and power amplifier. Petitioner contends that it did not have full knowledge of all its inventory, nor that it included illegal equipment for sale. Further, Petitioner noted, it had dismissed two employees who it had concerns about.[2]

III. DISCUSSION AND CONCLUSION

6. With respect to Petitioner's argument that it was not aware of its inventory, or that its employees were selling this illegal equipment, we note that it is an established principle of law that employers are responsible for the acts of their employees or agents. *See Triad Broadcasting Company, Inc.*, 96 FCC 2d 1235, 1242 (1984); *The Computer Force*, 8 FCC Rcd 1763 (1993). Under the Communications Act and the Commission's Rules, a violator's knowledge or understanding of the law is unnecessary to a determination of whether a violation existed. *See Empire Broadcasting Corp.*, 25 FCC 2d 68 (1970). Further, our investigation was initiated one week after a complaint regarding the sale of other illegal equipment, and clearly after the business had come under its new ownership.

7. We note that Commission records indicate that Petitioner has no previous history of violations. We have, therefore, adjusted the forfeiture amount downward.

IV. CONCLUSION

8. For the reasons stated above, we are reducing the monetary forfeiture to $5,600. Petitioner has failed to raise any reasons requiring a further reduction of the forfeiture amount. In determining the amount of forfeiture, the Commission's policy regarding forfeiture adjustments was taken into consideration. *See 1993 Policy Statement, Standards for Assessing Forfeitures*, FCC 93-382 (released August 12, 1993). No further adjustments appear warranted.

V. ORDERING CLAUSES

9. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petitioner's request for reconsideration pursuant to Section 1.106 of the Rules is DENIED.

10. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80 of the Rules, 47 C.F.R. § 1.80, that Roadrunner shall submit the $5,600 monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. Please place NAL number 215PO0019 on the remittance and send it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

11. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to Roadrunner Electronics, Eugene, Oregon.

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[1] The marketing of linear amplifiers which are designed to increase power to levels in excess of that authorized by the Rules is prohibited. 47 C.F.R. § 2.815.

[2] Petitioner also contends that the forfeiture amount is beyond the Corporation's financial capabilities. Although the Commission does consider ability to pay in determining the appropriate forfeiture amount, consideration is based on objective evidence. Generally this takes the form of tax returns for the past three years audited financial statements, or other reliable indicators of the financial ability to pay.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

License Renewal Applications of
Certain Commercial Radio Stations
Serving Philadelphia, Pennsylvania

Station WIOQ(FM)	File No. BRH-910401C6
Station WJJZ(FM) [Formerly WEGX(FM)]	File No. BRH-910328YY
Station WMMR(FM)	File No. BRH-910329ZY
Stations WOGL(AM)/ WOGL-FM	File Nos. BR-910329ZT and BRH-910401E9
Stations WPEN(AM)/ WMGK(FM)	File Nos. BR-910329B8 and BRH-910329YR
Station WUSL-FM	File No. BRH-910315YE
Station WXTU-FM	File No. BRH-910329YV
Station WYSP-FM	File No. BRH-910401F2

MEMORANDUM OPINION AND ORDER

Adopted: August 23, 1993; Released: August 24, 1993

By the Chief, Audio Services Division:

1. This proceeding involves the license renewal applications of ten commercial radio stations serving Philadelphia, Pennsylvania. The Philadelphia Lesbian and Gay Task Force joined by five additional Philadelphia organizations (collectively "Petitioners") challenge the stations' applications in a document entitled "Petition to Deny."[1] Petitioners allege that the stations presented inadequate issue-responsive programming during the last license period.[2] Petitioners also allege that three of the stations did not properly maintain their public inspection files. All of the licensees filed individual Oppositions, to which Petitioners filed one Joint Reply. Upon our review of the information before us, we are not convinced that any issue raised requires a hearing or any adverse action on any of the stations' license renewal applications. Accordingly, the "Petition" will be denied.

BACKGROUND

2. In assessing the merits of a petition to deny or informal objection, we follow a two-step analysis. First, we determine whether it makes specific allegations of fact which, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest. If so, then we proceed to examine and weigh all of the material before us, including the renewal applicant's submissions, to determine whether there is a substantial and material question of fact requiring resolution in a hearing. *See generally*, 47 U.S.C. Sections 309(d)(1) and (2), as explained in *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). If the facts are not disputed,

[1] The organizations challenging the renewals are The Philadelphia Lesbian and Gay Task Force (PLGTF), The National Organization for Women, Pennsylvania and Philadelphia Chapters (NOW); ACT-UP, Philadelphia; Aspira, Philadelphia; Black and White Men Together, Philadelphia; and Custody Action for Lesbian Mothers, Inc. Some of the stations argue that these organizations have not established legal standing. We agree as to each organization except Aspira. Although each organization submits an affidavit from its leadership, none of these affidavits establish that this person resides within the stations' listening area or listens to the stations as is required for standing. *See Standing of a Party to Petition to Deny*, 82 FCC 2d 89, 98-99 (1980). While the "Petition" also contains affidavits from several individuals who do establish residency or listenership, these individuals do not show affiliation with any of the petitioning organizations and therefore cannot confer standing on these organizations. *Id.* Accordingly, PLGTF, NOW, ACT-UP, Black and White Men Together, and Custody Action for Lesbian Mothers shall be treated as informal objectors. We shall treat Aspira as a Petitioner to Deny because Aspira's Executive Director established in a closely connected case that he is a Philadelphia resident and submits an affidavit in the present case on behalf of Aspira members. *See Spectacor Broadcasting*, FCC 93-395, 8 FCC Rcd _____, *slip op.* at para. 3 (released August 20, 1993).

[2] Petitioners raise similar arguments with respect to the renewal applications of three additional stations: WIP(AM) and WEAZ(AM)/WEAZ-FM (now WBEB(AM)/WBEB-FM). The Commission recently issued a separate decision with respect to station WIP(AM). *Spectacor Broadcasting*, FCC 93-395, 8 FCC Rcd _____ (released August 20, 1993). With respect to stations WEAZ(AM)/WEAZ-FM (which changed their call signs to WBEB(AM)/WBEB-FM on May 26, 1993) the staff granted these renewal applications on June 23, 1992, not realizing that a programming challenge was pending. A public notice of the grant was issued on June 29, 1992. (*See Public Notice* Report No. 21410). The renewal grant became final because no request for rescission or reconsideration of that action was received within 30 days of the public notice, nor did the staff learn of this matter within that time. *See* 47 C.F.R. Section 1.104. Accordingly, Petitioners' challenge with respect to the renewals of the former WEAZ(AM)/WEAZ-FM shall be dismissed as moot. *See WEBR, Inc. v. FCC*, 420 F.2d 158, 165 (D.C. Cir. 1969); *Theodore E. Sousa*, 92 FCC 2d 173 (1982) (finality of administrative decisions). We note for informational purposes, however, that Petitioners' allegations against WEAZ(AM)/WEAZ-FM raise the same types of programming and public file issues that we address as to the other stations and that the quantity of programming alleged for WEAZ(AM)/WEAZ-FM is slightly higher than that of station WIOQ(FM) whose license is renewed herein. The record with respect to WEAZ(AM)/WEAZ-FM (now WBEB(AM)/WBEB-FM) would not have formed a sufficient basis for adverse action on the stations' renewal applications and certainly would not cause us to initiate revocation proceedings.

but disposition turns on inferences and legal conclusions to be drawn from facts already known, a hearing is unnecessary. *Stone v. FCC*, 466 F.2d 316, 323 (D.C. Cir. 1972).

PROGRAMMING

3. The first issue before us is whether the ten stations examined herein presented adequate issue-responsive programming. Licensees have an affirmative obligation to present informational programming addressing issues and problems of importance to their communities. *Deregulation of Radio*, 84 FCC 2d 968, 982 (1981); *recon. granted in part and denied in part*, 87 FCC 2d 797, *aff'd in part and remanded in part sub nom., Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). The public can evaluate a licensee's performance by examining a station's issues/programs lists. These lists, placed in the stations' public file every three months, identify what the licensee believes to be its most significant issue-responsive programming.

4. Petitioners studied the issues/programs lists of Philadelphia radio stations for the two year period January 1989 through December 1990. They examined the amount of reported programming of specific concern to women, African-Americans, lesbians, gays, and Hispanics and the extent to which the stations addressed the issue of AIDS. According to the study, the ten stations herein devoted from .1% to .6% of their air time to issues of specific relevance to women and minorities, and from .3% to 1.8% of their air time to issue-responsive programming overall.[3] Expressed in terms of average number of minutes per month, the study reports between 36.7 and 139 minutes of minority-oriented programming and between 118.3 and 808.5 minutes of overall issue-responsive programming monthly. Petitioners believe that these numbers demonstrate inadequate broadcast service to the particular groups studied as well as to the general population of Philadelphia.[4]

5. The licensees respond that they selected issues in good faith, that many of the issues presented were relevant to women and minorities, and that the quantity and quality of their programming was sufficient. Some supply us with their issues/programs lists, descriptions of additional programs not reported on these lists, and their methods for ascertaining community problems. Many challenge the study's methodology and argue that it understates the quantity of their programming. For example, they state that the study credits programming as relevant to a particular group only if the program addresses a problem or aspect of a problem unique to that group. The licensees also note that the study also does not include a number of programs which the stations were not required to report on their issues/programs lists. Petitioners defend their study, arguing that they did their best with the information available to them and that no licensee presented a study of its own to refute Petitioners' findings.

6. The Commission had the opportunity to examine similar programming arguments in cases brought by several of the same parties against the license renewals of other Philadelphia broadcast stations. *License Renewal Applications of Certain Commercial Television Stations Serving Philadelphia, Pennsylvania*, 5 FCC Rcd 3847 (1990), *recon. denied*, 6 FCC Rcd 4191 (1991) ("*Philadelphia Television Stations*"); *Spectacor Broadcasting (Station WIP)*, FCC 93-395, 8 FCC Rcd _____ (released August 20, 1993). The arguments in these proceedings were similar to those raised here and, therefore, much of the Commission's previous analysis is equally applicable to the current case.

7. As the Commission has long stated, licensees have broad discretion to choose, in good faith, the issues the licensee believes to be of concern to the community and the best way to address those issues. *Time-Life Broadcast, Inc.*, 33 FCC 2d 1081, 1092 (1972). *See Office of Communications of United Church of Christ v. FCC*, 707 F.2d 1413, 1431 (D.C. Cir. 1983). Pursuant to this broad discretion, which is rooted in the right to free speech, the Commission does not require licensees to present any specific quantity of overall issue-responsive programming, to address any particular topic, or to cover every aspect of a topic addressed. *See Philadelphia Television Stations*, 5 FCC Rcd at 3847-48. We will intervene in programming matters only if a licensee abuses its discretion, *i.e.*, if it is unreasonable or discriminatory in its selection of issues or offers such nominal levels of issue-responsive programming as to have effectively defaulted on its obligation. *Id.* Thus, to make a *prima facie* case that a licensee abused its discretion over programming matters, Petitioners bear a heavy burden. *Philadelphia Television Stations*, 5 FCC Rcd at 3848.

8. *No Prima Facie Case.* Petitioners' major argument is one of insufficient program quantity -- both overall and of specific relevance to women and minorities. We find, however, that Petitioners have not made a *prima facie* case that the stations' programming efforts were *de minimis* in either regard. The Commission eliminated quantitative guidelines for non-entertainment programming because it did not want to play a "numbers game" whereby license renewal decisions would turn on statistics alone. *See Deregulation of Radio*, 84 FCC 2d at 991. While we will consider such statistics as one factor in evaluating a station's performance, arguments based solely on the failure to present specific amounts of non-entertainment programming are not sufficient to challenge a station's overall efforts. *Philadelphia Television Stations*, 6 FCC Rcd at 4192; *Spectacor Broadcasting (Station WIP)*, FCC 93-395, 8 FCC Rcd _____ at note 11 (released August 20, 1993). Accordingly, the Commission has not delineated any exact quantity of issue-responsive programming that would be considered *de minimis*, and we examine such allegations on a case-by-case basis.

9. Petitioners' allegations, which are almost exclusively statistical, are insufficient to demonstrate that the stations defaulted on their obligation to serve the public interest.

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[3] No percentages are available for station WOGL(AM), which was not included in the original study. Petitioners express WOGL(AM)'s programming in terms of the number of minutes per month devoted to each group or issue.

[4] Petitioners also argue that the stations' programming was lacking in quality. They maintain, for example, that the stations aired issue-responsive programming during periods of low listenership and covered some issues in short segments that precluded in-depth coverage. As in the *Philadelphia Television Stations* case, which involved similar allegations, we find that Petitioners have not adequately supported their contentions. *See Philadelphia Television Stations*, para. 6 *infra*, 5 FCC Rcd at 3848.

Further, while we reiterate that statistics are only one factor to be considered, we note that the quantity of programming alleged here is similar to that alleged in cases in which the Commission found programming efforts to be adequate. *Philadelphia Television Stations*, 5 FCC Rcd at 3851, note 10 (alleged average overall issue-responsive programming ranging from 1 to 8.4 hours weekly of which between 2.6% and 30.6% were devoted to minorities); *Spectacor Broadcasting (Station WIP)*, FCC 93-395, 8 FCC Rcd _____ (alleged average issue-responsive programming of 446.8 minutes per month overall with average of 72.5 minutes devoted to women and minorities). *Compare Simon Geller*, 90 FCC 2d 250, 264-67 (1982), *recon. denied*, 91 FCC 2d 1253, *aff'd in relevant part sub nom., Committee for Community Access v. FCC*, 737 F.2d 74, 77-78 (D.C. Cir. 1984) (comparative renewal applicant's informational programming too minimal to deserve renewal expectancy when it comprised .48% of the station's air time and consisted solely of public service announcements that did not respond to any ascertained community needs).

10. Petitioners also have not shown that any licensee's programming decisions discriminated against or ignored the needs of any substantial segment of the Philadelphia community. *See Time-Life Broadcast, Inc.*, 33 FCC 2d 1081, 1093 (1972); *Alabama Educational Television Commission*, 50 FCC 2d 461 (1975). Petitioners' own study shows that every licensee addressed a number of issues specifically relevant to women, African-Americans, and the issue of AIDS. The stations may not have addressed every problem that Petitioners view as important or presented programming in proportion to a group's percentage in the community population, but such programming would not be required. *Philadelphia Television Stations*, 5 FCC Rcd at 3848 and cases cited therein.

11. Nor would the Commission require a station to present programming specifically designed for minority groups if the station's programming for the community as a whole also satisfies the needs of minorities within that community. *See Puerto Rican Media Action and Educational Council, Inc.*, 51 FCC 2d 1178, 1181-82 (1975). In the present case, Petitioners argue that several stations did not present any programs designed for gays and lesbians or Hispanics[5] but they do not show that any station's programming for the broader community failed to meet needs of these groups. For example, Petitioners identify AIDS as an issue of great concern to lesbians, gays, and Hispanics. However, Petitioners do not count as relevant to these groups any AIDS programming not specifically focussed on lesbians, gays, or Hispanics. Petitioners mistakenly assume that an issue or problem must affect a particular group exclusively for a station to reasonably consider programming on that issue relevant to that group. Their study based on this premise is clearly insufficient to establish that any station's programming decisions were discriminatory.

12. *No Substantial and Material Questions.* It further appears from the licensees' records reviewed separately below that each station provided programming to an extent and in a manner well within its broad discretion. Thus, even had a *prima facie* case been raised against any station, there would be no substantial and material question of fact requiring a hearing. In examining the quantity of each station's issue-responsive programming, we consider programs not included on the station's issues/programs lists because such lists need not enumerate every issue-responsive program aired. *See Philadelphia Television Stations*, 5 FCC Rcd at 3851, n.13.

13. *WJJZ(FM) [former WEGX].* Review of information submitted in the station's Opposition indicates that it regularly airs a number of 30-minute public affairs programs including *Focus On Philadelphia, It's the Law, Tri-State Issues, Public Interest Affiliates* and *American Focus*. The station also airs public service announcements. The Petitioners' study and the station's issues/programs lists show that the station presented multiple programs addressing issues of specific concern to each of the groups studied and on the issue of AIDS. Examples of these issues include women's rights and abortion, the AIDS Law Project, black on black crime, and violence and discrimination against homosexuals. In addition the station aired programming addressing issues of general concern including the environment, housing, health, business, employment, youth, and education.

14. *WIOQ(FM).* The station's licensee at the time of Petitioners' challenge, Professional Broadcasting, Inc.,[6] acquired the station in January 1989. For the first two quarters of 1989, the station's community service was limited to on-air promotion of several community organizations and off-air participation in charitable events. We find these start-up efforts very small. However, we conclude that the licensee's overall programming efforts were sufficient due to substantial programming improvements in subsequent quarters. In August 1989 the station initiated a 30-minute weekly public affairs program *Q-Spectives*. By 1990 it added more programs including *American Focus* (a 30-minute weekly interview program) and *Power Line* (a 30-minute weekly religious program directed at counseling youth) and increased the extent of its public service announcements to the benefit of 120 organizations. As for the specific issues covered, the station covered primarily topics of broad public concern such as substance abuse, the environment, runaways, education, and hunger. With respect to issues of specific concern to the groups studied, the station addressed such topics as women's health, support for women after divorce, and community programs for African-Americans. The study credits WIOQ with presenting some programming for each group except gays and lesbians. The station, however, states that it aired public service announcements for the Philadelphia Lesbian and Gay Task Force, which were not reported on its issues/programs lists. In addition, the licensee states that it considered its programming on the issue of AIDS relevant to the lesbian and gay community because, although AIDS is not an exclusively gay disease, it has been of concern to the gay community.

15. *WPEN(AM)/WMGK(FM).* This AM/FM combination airs issue-responsive programming in the form of 30-minute and 60-minute public affairs programs such as *Challenge, Straight Talk, Profiles and Issues, Philadelphia*

[5] Hispanics comprise only 3.82% of Philadelphia's overall population and, therefore, would not be considered a substantial segment of the community for purposes of our issue-responsive programming analysis. *Spectacor Broadcasting*, FCC 93-395, 8 FCC Rcd _____ at note 9 (released August 20, 1993).

[6] In February 1993 the station's license was assigned to EZ Philadelphia, Inc.

Get to Know Us, and *Philadelphia Tribune Meetingplace*. The stations also present public service announcements and news features. Among program segments aimed specifically at women and minorities were those entitled A Woman's Guide to Divorce, Black Gay and Lesbian Literature, Race Relations in Philadelphia, and AIDS Discrimination. The licensee considered its AIDS programming as relevant to gays and lesbians. The licensee also states that it aired interviews with the Executive Director of the Lesbian and Gay Task Force in 1987 and 1991, outside of the period studied. Further, the licensee presented programming addressing issues of a broader nature including health, crime, education and employment, children and youth, substance abuse, education, the elderly, housing and homelessness, economic issues, government and public policy, transportation, help for the poor, and the Persian Gulf Crisis.

16. *WMMR(FM)*. WMMR's licensee acquired the station in December 1989. It states that in a typical week it broadcasts two hours of regularly scheduled public affairs programming, as well as regularly scheduled newscasts, commentary, and approximately 80 public service announcements. Its public affairs programming is currently a two-hour version of the program *Family*. At other times, the station presented a shorter (30-minute) version of *Family* and two other weekly programs, *It's the Law* (30 minutes) and *In the Public Studio* (1 hour). Among the topics addressed that the licensee believed to be of specific concern to women and minorities are: employment issues for women, divorce and single parenting problems of women, the Lesbian and Gay Task Forces' challenge of local TV coverage of minority and gay issues, family life in the Black community, and achievements of the gay and lesbian community. The study credits the station with multiple programs specifically addressing issues of concern to all of the groups except Hispanics. The licensee states that it did present specific Hispanic programming, however, citing to a program about problems that gays experience in the Hispanic culture. This program was presented in 1991, outside the period studied by Petitioners. The station also addressed topics of general interest such as drugs, the environment, education, crime, employment, health, transportation, child abuse, and housing.

17. *WOGL(AM)/WOGL-FM*. WOGL(AM) and WOGL-FM are co-owned stations which since August 1990 have simulcast portions of their entertainment and news programming. The stations broadcast their own schedule of public affairs programs, editorials, and public service announcements, however. Prior to August 1990 WOGL(AM) operated under the call sign WCAU with a different format.

18. With respect to the AM station, Petitioners' arguments are based on only a 4 month period corresponding to the new format. The station's performance under the old format (all talk, news, and information) is reported separately and shows an additional seven hours per month of programming addressing concerns of the specific groups studied and the issue of AIDS. Among the topics discussed were the need for AIDS education, women in the media, and extending rights of marriage to gay partnerships. We agree with the licensee that programming under the station's old format should be considered when reviewing the station's overall performance. Further, the station's issue-responsive programming under the new format does not appear lacking. The station regularly broadcasts one 60-minute and four 30-minute public affairs programs each week, including *FORUM 1210*, *Capital Ideas*, *American Focus*, *Commonwealth Club*, and *Rutgers University Forum*. It also airs weekly editorials and a 90-second public opinion program *Street Talk*. WOGL(AM) also carries public service announcements for approximately 200 organizations in a typical year.

19. With respect to WOGL-FM, which Petitioners studied for a full two year period, the record reflects that the station aired 5 1/2 hours of public affairs programming per week (comprised of 3 1/2 hours of newly-aired programming and 2 hours of repeats of these programs). Among the weekly programs presented were two 60-minute interview/discussion programs *98 FORUM* and *Crosstalk* and the 30-minute programs *Focus*, *The Reviewing Stand*, and *Healthscope*. WOGL-FM also periodically broadcast editorials and, in a typical year, carried public service announcements for over 150 organizations. Among the topics that the licensee identifies as relevant to women and minorities are Gay Pride Month, racism, abortion, day care, AIDS treatment and testing, gay and lesbian rights, minority set-asides, breast cancer, discrimination, teenage pregnancy, and the inner-city poor, as well as programming addressing more general issues.

20. *WUSL-FM*. WUSL-FM states that the core audience for its urban contemporary format is female and African-American. Accordingly, WUSL-FM believes that it is particularly sensitive to the needs of these groups. Of the stations discussed herein, the study credits WUSL-FM with presenting the largest number of programs addressing specific women's and African-American issues. Among topics discussed were whether women are paid fairly compared to men and the shortage of compatible organ transplants for African-Americans. As to Hispanics, gays, and lesbians, the study credits the station with fewer specific programs. The station states it presented many programs relevant to these groups but did not enumerate all of them on its issues/programs lists. For example, the station states that it covered prejudice against Gay African-Americans, Gay and Lesbian Pride Month, gay marriages, racism against Hispanics, and inter-ethnic tensions between Whites and Latinos. WUSL-FM has two full length public affairs programs which air weekly: *Sunday Morning Live* (one hour) and *99 Magazine* (two hours). The station also airs several shorter programs such as *We Gotta Talk* (five minutes on Sundays), *Street Talk* (a one-minute, five-part series aired weekdays and re-aired in its entirety on Saturday), and *People Poll* (a one-minute "collage" of listener opinions). The station states that it also covers minority-oriented topics that do not focus on one particular group such as racial and cultural bias in standardized testing and fair housing for minorities. It also addressed issues of broader concern such as drug and alcohol abuse, unemployment, crime, poverty, community service, and religion.

21. *WXTU-FM*. WXTU-FM's issue-responsive programming includes two 30-minute public affairs programs weekly, various news presentations, and approximately 11 public service announcements per day. The licensee states that the study underreports its total hours of issue-responsive programming because the study did not count rebroadcasts, which the study says the station uses extensively. For example, WXTU-FM repeats some of its public service announcements daily for between 13 and 18 days but the study would have credited such programming only once. According to the licensee, if one counts the station's rebroadcasts, its total quantity of issue-responsive programming as reported in the study would increase by about 50%. During the period studied by Petitioners the station

addressed the following topics which it considers specifically relevant to women, minorities, and persons concerned about AIDS: sexually transmitted diseases, rape, AIDS, English as a second language, sex discrimination, abuse of women, businesswomen and entrepreneurship, discrimination and hate crimes, bigotry and injustice, divorce and older women, and Asian and Hispanic immigrants. It also covered additional topics which it considers relevant to all such as health, government-related problems, education, and housing.

22. *WYSP-FM.* WYSP-FM broadcasts five or more public affairs programs each week, with each program ranging in duration from 25 to 60 minutes. These programs include *Soundings* (30 minutes), *Listen Closely* (30 minutes), *What You Should Know* (60 minutes), *Rutgers Forum* (25 minutes), and *Focus On Youth* (30 minutes). The station also airs approximately 50 public service announcements per week. The study credits WYSP-FM with the most overall issue-responsive programming of those stations challenged. The study also shows that the station addressed multiple issues specific to each group studied and the issue of AIDS. Among issues covered were women in politics, the role of Black leaders in developing racial and sexual equality, the gay movement, growth of the Hispanic community, and AIDS legislation. The station also addressed many issues of broader concern such as taxes, health, over-development, drug abuse, politics, and consumer services.

PUBLIC FILE

23. Petitioners also allege that 3 stations (WIOQ, WMMR, and WYSP) failed to comply with the Commission's public file requirements. The Commission considers proper maintenance of a station's public inspection file an important obligation of broadcast licensees. *See* 47 C.F.R. Section 73.3526. However, a public file violation without more would not generally warrant a sanction so severe as non-renewal of a station's license. *See generally Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126, 2137 (Rev. Bd. 1987), *aff'd* 4 FCC Rcd 2553, *recon. denied* 4 FCC Rcd 6312 (1989). For the reasons set forth below, we find that Petitioners' public file allegations either lack merit or warrant action other than non-renewal.

24. *WIOQ(FM).* Petitioners allege that upon their initial examination of WIOQ's public file, there were no issues/programs lists for the first and second quarters of 1989. WIOQ admits that it did not prepare these lists contemporaneously but states that it did reconstruct these reports and make them available to Petitioners.[7] In its license renewal application, the station discloses and explains the absence of the two lists.

25. The purpose of our public file rule is to provide the public with information at regular intervals throughout the license term. Substantial compliance is not achieved by reconstruction at a later date. *See Pacifica Foundation*, 95 FCC 2d 750, 763 (1983). By failing to place two issues/programs lists in the public file in a timely manner WIOQ violated our rules. However, given the limited extent of the missing information, the station's forthrightness with the Commission about this matter, and its taking corrective steps soon after learning of the problem, we do not believe that any sanction is warranted. We will, however, caution WIOQ's licensee to exercise greater care to comply with our public file requirements in the forthcoming license term.

26. *WYSP-FM.* Petitioners' sole public file claim against WYSP-FM is that it did not include the durations of public service announcements reported on its issues/programs lists. We dismissed a similar claim raised against a different station in the *Philadelphia Television Stations* case. As in that case, "we do not believe that any significance attached to the fact that the duration of each PSA broadcast is not provided, due to the typically short length of such announcements." *Philadelphia Television Stations*, 5 FCC Rcd at 3850.

27. *WMMR(FM).* Petitioners allege that at the time of their initial examination of WMMR's public file in June 1990 the issues/programs list for the 4th quarter of 1989 was missing and that several unspecified lists were either missing or reconstructed.[8] Petitioners also allege that WMMR's licensee, Westinghouse/Group W Radio, misrepresented itself to the Commission by indicating in Question 8 of its renewal application that it placed all documents in its public file in a timely manner.

28. In its Opposition, the licensee states that all but one of the lists unavailable to Petitioners during its June 1990 inspection covered periods prior to the licensee's own acquisition of the station. The one missing list for which the current licensee would be in part responsible is the fourth quarter of 1989. That list should have included the old licensee's final two months and the new licensee's first 25 days of operation.

29. Petitioners submit a Reply in which they allege that the deficiencies with WMMR's public file extend beyond operations of the former licensee. According to Petitioners, the station first prepared lists covering the third and fourth quarters of 1990 in response to Petitioners' 1991 request for these lists. Petitioners' allegations of reconstruction are supported with respect to one list by a handwritten note on station letterhead. In that note, date stamped April 1, 1991, the station employee responsible for the public file states "I am still reconstructing 1990 3rd Qtr. Issues Programs." The station verifies the authenticity of this note but nevertheless

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[7] Petitioners argue that the two reconstructed lists were not specific enough. The lists, which report only public service announcements, identify the organizations for which the announcements were made, the topic of the announcements, the reasons why the station thought these topics were important, and approximate time periods during which the announcements aired. Given the typically short length of public service announcements, this information is sufficient for us to evaluate the licensee's performance. *See* para. 26 *infra*.

[8] The licensee acknowledges that, at the time of Petitioners' initial examination of the file, two lists (fourth quarter 1984 and fourth quarter 1987) were missing. In responsive pleadings Petitioners identify two more allegedly missing lists (third quarter 1984 and second quarter 1989), and the licensee denies that these lists were missing. In any event, all four lists covered periods prior to the current licensee's acquisition of WMMR and there is nothing to suggest that the current licensee was in any way responsible for any absence of this information from the public file. Thus, even assuming that all four lists were missing, this would not indicate any violation of the public file rule by the current licensee. *See Philadelphia Television Stations*, 6 FCC Rcd at 4194, note 9 (1991). We do note and the licensee acknowledges, however, that the station's answer to the public file question of the license renewal application should have disclosed that some of the former licensee's reports were missing.

maintains that it placed the lists in the file in a timely manner. According to the station, the third quarter list would only have been reconstructed if it were temporarily lost or mislaid as of the date of Petitioners' request. As to the other allegedly missing list (fourth quarter 1990) the station responds that the list was in the public file but that it took approximately 60 days to compile this and other documents that Petitioners requested via telephone and letter.

30. We conclude that two of WMMR's issues/programs lists (fourth quarter 1989 and third quarter 1990) were reconstructed by the current licensee. Regardless of whether these lists were prepared contemporaneously and lost or prepared late, WMMR's renewal application would contain an incorrect certification of the licensee's total compliance with our public file rules. *See Pacifica Foundation*, 95 FCC 2d 750, 763 (1983). The record does not, however, establish that the licensee made this certification with any intent to deceive the Commission or that the licensee engaged in a degree of carelessness so "wanton, gross, and callous" as to be the equivalent of an affirmative and deliberate intent to deceive. *See Golden Broadcasting Systems*, 68 FCC 2d 1099, 1106 (1978); *See generally Fox River Broadcasting*, 93 FCC 2d 127, 129 (1983). Nor does the certification appear to be the result of any lack of licensee supervision of station employees. *See Trustees of the University of Pennsylvania (WXPN)*, 69 FCC 2d 1394 (1978). Accordingly, the incorrect certification in WMMR's license renewal application does not raise any question with respect to the licensee's character qualifications or its control over the station. *See Arkansas Educational Television Commission*, 6 FCC Rcd 478 (1991).

31. In determining the appropriate action for this matter, we take into account that the lists at issue cover only 4 months of the current licensee's operations and that the station appears to have been otherwise cooperative in making information available to Petitioners. Under these circumstances, we find that an admonishment of the licensee offers sufficient redress for the matters raised. *See Philadelphia Television Stations*, 6 FCC Rcd at 4194, note 10. We admonish WMMR to pay close attention to proper maintenance of its public file in the forthcoming license term and to exercise greater care in reviewing its files before certifying to its compliance with our rules.

CONCLUSION AND ORDERING CLAUSES

32. Based on the foregoing, we find that the Petitioners have failed to raise substantial and material questions of fact requiring resolution in a hearing.

33. IT IS ORDERED that the informal objection filed jointly by the Philadelphia Lesbian and Gay Task Force; the National Organization for Women, ACT-UP, Black and White Men Together, and Custody Action for Lesbian Mothers, Inc. (which will be treated as a Petition to Deny as to Aspira) IS DISMISSED AS MOOT as to stations WBEB(AM)/WBEB-FM (formerly WEAZ(AM)/WEAZ-FM) (see note 2 *supra)* and IS DENIED as to the ten other stations referenced below.

34. With respect to stations WIOQ(FM), WMGK(FM), WPEN(AM), WOGL(AM), WOGL-FM, and WUSL(FM) we find that applicants are fully qualified and that grant of their renewal applications would serve the public interest, convenience, and necessity. Thus, IT IS FURTHER ORDERED that the license renewal applications for stations WIOQ(FM), WMGK(FM), WPEN(AM), WOGL(AM), WOGL-FM, and WUSL(FM) ARE GRANTED.

35. With respect to the license renewal applications for stations WJJZ(FM), WMMR(FM), WXTU-FM, and WYSP-FM, other petitions remain pending concerning the stations' compliance with our equal employment opportunity rules. The applications for these stations shall remain in a pending status until these other matters are resolved.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads
Chief, Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Hispanic Radio Broadcasters (Assignor) — File No. BAL-930305EG

and

Harte-Hanks Television, Inc. (Assignee)

For Assignment of License of KVAR(AM), San Antonio, Texas

MEMORANDUM ORDER AND OPINION

Adopted: August 19, 1993; Released: September 3, 1993

By the Commission:

1. The Commission has before it the above-captioned application for assignment of license of KVAR(AM), San Antonio, Texas, from Hispanic Radio Broadcasters ("HRB") to Harte-Hanks Television, Inc. ("Harte-Hanks"), and a related request for waiver of 47 C.F.R. Sec. 73.3555(c), the Commission's one-to-a-market rule.[1] Harte-Hanks is the licensee of VHF station KENS-TV, San Antonio. The 2 mV/m contour of KVAR(AM) encompasses all of San Antonio, KENS-TV's community of license. The application is unopposed.

2. Harte-Hanks bases its request on the Commission's one-to-a-market waiver standards adopted in *Second Report and Order* in MM Docket No. 87-7 (*"Second Report and Order"*), 4 FCC Rcd 1741, *recon. granted in part and denied in part,* (*"Second Report and Order Recon."*), 4 FCC Rcd 6489 (1989). Under these criteria, the Commission presumptively favors waiver requests involving station combinations serving the top 25 markets where there are at least 30 separately owned, operated and controlled broadcast licenses or "voices" after the proposed combination ("top 25 market/30 voice standard"). It also favors requests involving "failed" broadcast stations, that is, stations that have not been operating for a substantial period of time, *e.g.,* four months, or that are involved in bankruptcy proceedings. *See* 47 C.F.R. Sec. 73.3555, n.7. While Harte-Hanks does not meet the top 25 market/30 voice standard, it contends that much of the Commission's rationale for granting such waivers applies to the San Antonio market. In particular, Harte-Hanks states that there are 51 broadcast stations in the market, representing 40 separate "voices", and that, according to Arbitron, the San Antonio ADI has grown from the 43rd largest market in 1990 to the 36th largest market in 1992.[2] Harte-Hanks also asserts that financially troubled KVAR(AM) qualifies as a failed station. In the alternative, Harte-Hanks seeks review of its waiver request under the case-by-case standard outlined in the *Second Report and Order.* Under this standard, the Commission makes a public interest determination based upon the following criteria: (1) the potential public service benefits of joint operation of the facilities; (2) the types of facilities involved; (3) the number of media outlets owned by the applicant in the relevant market; (4) the financial difficulties of the stations involved; and (5) the nature of the relevant market in light of the level of competition and diversity after the joint operation is implemented.

3. Although Harte-Hanks suggests that the proposed combination fulfills many of the criteria for a waiver under either the top 25 market/30 voice standard or the failed station standard, we decline to evaluate its request under those tests. On its face, the request meets neither of these two standards. Consequently, the instant waiver request will be considered under the case-by-case criteria.

4. In support of its waiver request, Harte-Hanks submits a detailed showing which addresses each of the five case-by-case factors. Harte-Hanks first contends that the proposed media combination will yield increased public service benefits, including economies of scale as well as programming and service benefits. Harte-Hanks estimates annual savings of $187,000 for the operation of KVAR(AM) over what it would cost to operate KVAR(AM) on a stand-alone basis through the sharing of staff and the use of shared studios, offices and equipment.[3] Further, Harte-Hanks states that the combination will allow KVAR(AM), which presently has only one full-time news employee, access to the 62-person news-gathering operation of KENS-TV.[4] Harte-Hanks also states that by reducing KVAR(AM)'s operating expenses, it will be able to allocate these resources to the production and broadcast of news, public affairs and other non-entertainment programming. In particular, Harte-Hanks proposes a format for KVAR(AM) which includes a combination of news, talk, call-in shows and information broadcast in English and Spanish, as well as broadcasts of Texas music featuring state and local artists. Harte-Hanks believes that the extensive technical and news-gathering support made available to KVAR(AM) by virtue of its combination with KENS-TV

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[1] Section 73.3555(c) of the Commission's Rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station.

[2] Harte-Hanks notes that the number of "voices" in the San Antonio market substantially exceeds the number required under the Commission's top 25 market/30 voice standard criteria.

[3] Harte-Hanks states that the proposed combination "will allow existing KENS-TV personnel to provide all administrative (estimated value: $15,000), traffic ($15,000), corporate support and maintenance ($17,000) and legal and management services ($40,000). The combination will also eliminate all of KVAR's current overhead cost (estimated savings: $100,000)."

[4] KVAR(AM), which also has no full-time technical staff, will have the benefit of KENS-TV's ten full-time technical staff employees and will also have access to the national and international new sources of KENS-TV such as CBS Southwest, Cable News Network and the Associated Press.

will allow KVAR(AM) to provide public service programming and local public affairs programming that the station currently cannot afford.

5. Second, regarding the technical facilities involved, Harte-Hanks notes that KVAR(AM) is a full-time Class B facility licensed to operate with 5 kW daytime and 1 kW nighttime, both with a directional pattern. KENS-TV is a VHF television station operating on Channel 5 with 100 kW ERP visual and 10 kW ERP aural at an antenna height above average terrain of 1401 feet. Harte-Hanks maintains that due to the nature of the facilities involved, the proposed combination does not present issues which might be posed by more dominant combinations involving, for example, a VHF TV station and an FM station, an AM/FM combination, or a Clear Channel AM station. Harte-Hanks states that KVAR(AM) averages only 1400 listeners per quarter hour in a Metro area with a population of over 1,185,000 people, which results in KVAR(AM) reaching only .001% of the Metro population.[5]

6. Third, with respect to the number of other media outlets the applicant already owns in the relevant market, Harte-Hanks affirms that, other than KENS-TV, it does not own any broadcast stations in the San Antonio area. Further, Harte-Hanks indicates that it holds no ownership in any cable system, newspaper or "other mass media outlet" in San Antonio.[6]

7. Fourth, with regard to the economic status of the stations involved in the proposed combination, Harte-Hanks contends that KVAR(AM) "is in a very precarious financial condition" and that it has never operated at a profit. Harte-Hanks states that HRB, which acquired KVAR(AM) in September, 1990, lost $265,265 in 1991 and $143,650 in 1992. For 1993, Harte-Hanks states that HRB projects a loss of at least $100,000. Further, Harte-Hanks argues that the only reason KVAR(AM) is not in bankruptcy at this time is due to the continuing infusion of funds from KDIF(AM), Riverside, California, which is also owned by HRB.[7] Without such support, Harte-Hanks concludes, KVAR(AM) would be unable to satisfy its current obligations and is thus economically similar to a failed station.

8. The fifth factor relates to the nature of the relevant market in light of the Commission's concerns about diversity and competition. Relevant indicia include the number of broadcast outlets, the number of separately-owned and operated "voices," and the presence of cable and non-broadcast media. As to the number of broadcast stations, the Commission has held that, in the context of a one-to-a-market waiver, it will consider the "relevant TV metro market for radio stations and the relevant ADI TV market for TV stations." *Second Report and Order*, 4 FCC Rcd at 1760, n.101. Harte-Hanks represents that the San Antonio ADI is ranked 36th in the country and contains 20 AM stations, 19 FM stations, 12 TV stations, one local daily newspaper and 59 weekly newspapers. Harte-Hanks further indicates that if the proposed combination is approved, the 51 broadcast stations in the San Antonio ADI will be owned and operated by 39 different "voices." Additionally, Harte-Hanks argues that the San Antonio Total Survey Area ("TSA"), as defined by Arbitron, is served by 20 television stations and that the San Antonio Radio Metro Market is served by 45 AM and FM stations. Further, Harte-Hanks asserts that a total of 18 cable systems serve the San Antonio ADI with total cable penetration of 66% as well as VCR penetration of 82%. Finally, citing *Great American Television and Radio Co., Inc.*, 4 FCC Rcd 6350 (1989), Harte-Hanks notes that the Commission will take into consideration San Antonio's status as one of the nation's largest and fastest growing metropolitan areas as evidence that there is little likelihood that the market is so volatile or subject to imminent change that these levels of competition and diversity will likely decrease in the foreseeable future.[8]

9. In evaluating a request for a waiver of the one-to-a-market rule, the Commission's goal "is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market areas involved." *Second Report and Order Recon.*, 4 FCC Rcd at 6491.[9] We conclude that Harte-Hanks' showing in support of a waiver of the one-to-a-market rules meets our case-by-case criteria, and that a waiver in this instance is in the public interest and would not have an adverse effect on diversity and competition in the San Antonio market.

10. Harte-Hanks has shown that joint operation of the stations will result in significant cost savings as well as the potential for enhanced programming and service benefits. It has further been established that KVAR(AM) has consistently lost money and has shown a negative cash flow since its present owner acquired the station three years ago. Furthermore, Harte-Hanks has demonstrated that the proposed combination will not create any undue concentration of ownership or control of the broadcast media in the San Antonio market. The San Antonio market will be served by 39 radio stations and 12 television stations. Those 51 stations will be owned and operated by 39 separate entities. In addition, the other "voices" in the San Antonio market include one daily newspaper, 59 weekly newspapers and cable television, which has a penetration of 66%.[10]

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[5] In support, Harte-Hanks provides the Fall 1992 Arbitron Radio Ratings Summary Report for the San Antonio Radio Metro Market which states that, during morning hours, KVAR(AM) had 1.3% share, during daytime hours, a 0.4% share, and during afternoon hours, a 0.6% share.

[6] Harte-Hanks Communications, Inc., a wholly-owned subsidiary of HHC Holding, Inc., owns 100% of the issued and outstanding capital stock of Harte-Hanks Television, Inc. Harte-Hanks Communications, Inc. and its various subsidiaries (excluding Harte-Hanks Television, Inc.) publish nine daily newspapers and approximately 40 non-daily newspapers and supplemental publications. They also publish "shoppers" in five major markets. Harte-Hanks represents that none of its newspapers are "published within the service area of KENS-TV or KVAR(AM) . . . ."

[7] In support, Harte-Hanks provides an affidavit from Gilberto Esquivel, the General Manager of KVAR(AM) and general partner of HRB. Harte-Hanks further notes that HRB acquired KVAR(AM) in 1990, but that the then-principal owner of HRB, Lincoln Dellar, died in July, 1992, and his ownership interest was transferred to his wife, Sylvia Dellar.

[8] According to the 1990 Census, San Antonio is currently the tenth-largest city in the country, with a population of 935,933.

[9] It should be also be noted that we do not "require that all five of the criteria be satisfied as a precondition to grant of a waiver." *South Central Communications Corporation*, 5 FCC Rcd 6697, 6698 (1990).

[10] This number does not include, as relevant "voices," the

Harte-Hanks owns no other media in the market. With respect to the technical facilities involved, we note that the proposed combination does not present issues of market dominance inconsistent with the public interest. Thus, we are persuaded that common ownership and joint operation of KVAR(AM) and KENS-TV will not adversely affect diversity and competition in the San Antonio market. The Commission, in the past, has granted waivers of the one-to-a-market rules under similar circumstances. *See, e.g., Great American Radio and Television Co., Inc., supra; United Radio Group, Inc.*, 7 FCC Rcd 2207 (1992).

11. Accordingly, IT IS ORDERED, That the request for a waiver of the Commission's one-to-a-market rule, 47 C.F.R. Sec. 73.3555(c), IS HEREBY GRANTED; and upon finding the applicants otherwise qualified, the application (BAPL-930305EG) for assignment of license of KVAR(AM), San Antonio, Texas, from Hispanic Radio Broadcasters to Harte-Hanks Television, Inc., IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

eight additional television stations which serve the San Antonio TSA and the six AM and FM stations, located outside of the San Antonio Metro Market, whose signals cover San Antonio.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 91-2

In the Matter of

Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide for Interactive Video Data Services — RM-6196

and

License Applications of Ann Bryant, Phillip C. Freitag, and Charles Steen for Interactive Video Data Services

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 1993; Released: September 3, 1993

By the Commission:

I. INTRODUCTION

1. On May 24, 1993, Larry M. Warner, Esq., Trustee, filed a Petition for Reconsideration or Clarification (petition) to permit Interactive Video and Data Service (IVDS) applications filed by the John Calvin Kemmer inter vivos trust to be accepted *nunc pro tunc* for certain IVDS filing windows previously closed. In addition, in the interest of administrative efficiency, this Order considers the Petitions for Reconsideration filed by William Zimsky, counsel for the Committee to Preserve Statutory Fees (CPSF), on behalf of CPSF members Ann Bryant and Charles Steen, and the Petition for Reconsideration filed by another member of CPSF, Phillip C. Freitag, that jointly concern the staff decisions of the Licensing Division, Private Radio Bureau, dismissing certain IVDS applications. This Order denies the petitions of Warner and Steen and dismisses the petitions of Bryant and Freitag.

II. BACKGROUND

2. On January 16, 1992, the Commission adopted a *Report and Order* (*Report*)[1] in this proceeding that, *inter alia*, established a frequency allocation and service rules for IVDS. The purpose of the *Report* was to make available an allocation of radio spectrum that licensees could use to provide a variety of radio-based interactive services to the public. In response to six petitions which requested reconsideration of certain aspects of the *Report*, a *Memorandum Opinion and Order* (*MO&O*)[2] variously granted and dismissed those requests. Following the adoption of the *MO&O*, two Petitions for Reconsideration and two requests for clarifications were filed concerning decisions taken in GEN Docket No. 91-2. The *Second Memorandum Opinion and Order* (*2d MO&O*),[3] adopted April 13, 1993, *inter alia*, granted the request for clarification filed by the law firm of Keller and Heckman and ordered a minor change in the IVDS rules to clarify that trusts would be eligible for IVDS station licenses.

3. In the petition, Warner notes that while the Commission changed the IVDS rules to clarify that trusts are eligible for IVDS licenses, the *2d MO&O* also stated that the filing windows previously announced in the proceeding would not be affected.[4] Nonetheless, Warner requests that Kemmer's IVDS applications, all of which were submitted to the Commission late for the filing windows concerned, be accepted *nunc pro tunc* for consideration.[5]

4. The three subject members of CPSF claim in their petitions that the staff decisions to dismiss certain IVDS applications should be reconsidered because the IVDS application fee was, *inter alia*, unreasonable.[6] The referenced staff decision did not concern one of the three petitioners, that of Bryant. The applications of Steen were dismissed because of the failure to provide the correct fee and because they were not signed. The application of Freitag was also dismissed because of a failure to provide the correct fee.

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[1] 7 FCC Rcd 1630 (1992).
[2] 7 FCC Rcd 4923 (1992).
[3] 8 FCC Rcd 2787 (1993).
[4] Petition at 2. *See also 2d MO&O* 8 FCC at 2789.P
[5] *Id.* at 2-3. Warner filed IVDS applications on behalf of Kemmer on April 29, 1993. Warner's subject Petition for Reconsideration was filed on May 24, 1993, and was announced in Public Notice Report No. 1948, released June 23, 1993. The Public Notice was published in the *Federal Register* on June 29, 1993. The law firm of Keller and Heckman filed a Opposition to the subject Petition for Reconsideration (Opposition) on July 14, 1993. Although not summarized herein, the Opposition of Keller and Heckman has been fully considered. We have not formerly considered Reply Comments filed by Warner in this proceeding because: 1) they were filed on August 2, 1993, after the applicable deadline, *See* 47 C.F.R. § 1.429(g), and 2) they address a staff decision by the Chief, Special Serives Branch, Licensing Division, Private Radio Bureau (*See* note 7, *infra*), which was not a matter raised in Keller and Heckman's Opposition. *See* 47 C.F.R. § 1.45(b). Because we have not formerly considered Warner's Reply Comments, we have also not considered additional comments filed by Keller and Heckman in response to the subject Reply Comments. We note, however, that nothing contained in these additional pleadings, which were treated as permissible *ex parte* pleadings, alter our conclusions.
[6] *See 2d MO&O* (wherein the Commission granted a CPSF petition concerning the IVDS application fee and amended the IVDS rules accordingly).

III. DISCUSSION

A. The Warner Petition.

5. The petition filed by Warner does not specify the decision contained in the *2d MO&O* for which he requests reconsideration or clarification. Because the petition concerns a trust that filed applications for several IVDS markets, it appears that Warner does not contest the decision in the *2d MO&O* that clarified that trusts shall be eligible for IVDS station licenses. The petition also does not request reconsideration of the decision to not re-open previously announced filing windows in order to permit trust applications to be filed. Rather, the petition appears to be one of several mechanisms employed by the petitioner[7] to have Kemmer's IVDS applications accepted despite the fact that were not timely filed.[8] The petition does not proffer any supportive reasoning that would suggest why Kemmer's late-filed IVDS applications should be accepted. The mere fact that the Commission amended its rules to clarify that trust applications may be filed is not a basis for accepting untimely trust applications for previously closed windows.

6. In addition, we note that Kemmer chose not to file during the three previous IVDS filing windows as a trust or in any other capacity. Further, prior to the filing the petition, neither Warner nor Kemmer chose to address the issue of the eligibility of trusts as parties to the GEN Docket 91-2 proceeding. Accordingly, the Warner petition is denied.

B. The CPSF Petitions.

7. Timely filed petitions for reconsideration regarding applications that were dismissed solely for failure to file the correct fee have been reinstated.[9] None of the three remaining petitions fall into this category, however. Because Charles Steen did not sign his IVDS applications, the applications could not be accepted for consideration.[10] Therefore, the staff decisions to dismiss his applications were proper. In addition, the referenced staff decisions did not refer to any applications filed by Ann Bryant. The Commission has no record of any IVDS application filed by Ann Bryant, and no proof has been supplied. In this case, therefore, there is no staff decision subject to review. Finally, because Phillip C. Freitag filed his petition for reconsideration after the statutory deadline for such petitions, his petition cannot be considered.[11] Accordingly, the petition of Steen is denied and the petitions of Bryant and Freitag are dismissed.

IV. ORDERING CLAUSES

8. In view of the foregoing and pursuant to the authority contained in Sections 4(i), 303(r) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 405, and Sections 1.429(a) and 1.913 of the Commission's Rules, 47 C.F.R. §§ 1.429(a) and 1.913, IT IS ORDERED THAT the Petitions for Reconsideration filed by Larry M. Warner, Esq., Trustee, and Charles Steen ARE DENIED and the Petitions for Reconsideration filed by Ann Bryant and Philip C. Freitag ARE DISMISSED.

9. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

10. For further information concerning this Order, contact Marc S. Martin, Private Radio Bureau, Federal Communications Commission, Washington, D.C., mail stop 17003, at (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[7] Despite its title, the petition contains text that is virtually identical to the text of Warner's "Petition/Motion To Accept IVDS Application[s] *Nunc Pro Tunc*" that was filed with Kemmer's IVDS applications on April 29, 1993, and dismissed by the Licensing Division, Private Radio Bureau. *See* Letter from Chief, Special Services Branch, Licensing Division, Private Radio Bureau, Federal Communications Commission, Gettysburg, Pennsylvania to Larry Warner, Esq., Trustee (this letter also denied Warner's "Waiver Request - If Necessary," filed April 29, 1993)(DA 93-819, July 1, 1993), 8 FCC Rcd 4829 (1993).

[8] *See* Public Notices of July 17, 1992 (DA-92-944), July 31, 1992 (DA-92-1028), and August 14, 1992 (DA-92-1084)(collectively announcing IVDS filing windows for a total of nine markets).

[9] *See 2d MO&O; see also, e.g.,* letter from Associate Managing Director for Operations, Federal Communications Commission, Washington, D.C. to William E. Zimsky (June 15, 1993).

[10] *See* 47 C.F.R. § 1.913.

[11] *See* 47 U.S.C. § 405. Freitag filed his petition for reconsideration on December 7, 1992, concerning a staff decision on which public notice was given on October 23, 1992. *See* 47 C.F.R. § 1.4(b)(5).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLTEL Service Corporation AAD 93-51

Petition for Waiver of the
Definition of "Study Area"
contained in Part 36, Appendix-
Glossary of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: August 30, 1993; Released: September 3, 1993

By the Chief, Accounting and Audits Division, Common Carrier Bureau:

1. In this Order we consider a petition filed by ALLTEL Service Corporation (ALLTEL) on behalf of its telephone operating affiliates, ALLTEL Pennsylvania, Inc. (ALLTEL-PA), Brookville Telephone Company (Brookville) and Murraysville Telephone Company (Murraysville) for waiver of the Commission's rules regarding a study area change.

I. INTRODUCTION AND BACKGROUND

2. On May 20, 1993, ALLTEL filed a petition for waiver of the definition of study area contained in the Appendix-Glossary of Part 36 of the Commission's rules. This waiver is requested in order to allow ALLTEL-PA to consolidate the Brookville and Murraysville study areas with its existing study area in conjunction with the merger of Brookville and Murraysville into ALLTEL-PA, the surviving corporation. We placed the petition on public notice on June 10, 1993.[1] ALLTEL filed a supplement to the petition on June 15, 1993, containing an order of the Pennsylvania Public Utility Commission (PPUC). We received comments in support of the waiver request from the National Exchange Carrier Association (NECA). No reply comments were received.

II. STUDY AREA WAIVER

3. The definition of study area contained in Part 36, Appendix-Glossary, of the Commission's rules states that study area boundaries shall be frozen as they were on November 15, 1984.[2] Companies wishing to change their study area boundaries can request a waiver of that rule. The Commission's three primary concerns in study area boundary change petitions are that the change have no adverse impact on the Universal Service Fund (USF) support program,[3] that the state commission(s) having regulatory authority not oppose the change,[4] and that the public interest be served.

4. The three study areas under consideration here have a geographic relationship to each other. The current study area of ALLTEL-PA consists of 54 exchanges serving 140,831 access lines. The study area of Brookville shares boundaries with ALLTEL-PA in several different locations, and consists of 24 exchanges and 33,024 access lines. The study area of Murraysville, near a portion of the ALLTEL-PA study area, consists of five exchanges and 28,117 access lines. All are predominantly rural areas in Southwestern Pennsylvania. The consolidation of the three study areas would be effective with the merger of the three companies. ALLTEL states that this transaction will have no impact on the high cost fund and that no waiver is required of any other Part 36 rule because ALLTEL-PA, the surviving entity, will remain an average schedule company.

A. Universal Service Fund Impact

5. The petition states that none of the three study areas currently receives any USF support and the consolidated study area of ALLTEL-PA will not be eligible for USF support. NECA, in its comments, verifies this assertion and supports the proposed transaction.

6. The Commission requirement that study area boundaries be frozen is intended, generally, to prohibit companies from setting up high cost exchanges within their existing service territories as separate companies in order to maximize high cost support. There are instances of study area changes that do not conflict with this fundamental concern. These include the merging of two or more study areas into a single study area. In the case under consideration, none of the three study areas receives any USF support, nor will the study area created by the consolidation be eligible for USF payment. The Commission generally encourages mergers of study areas such as this one.

B. State commission approval

7. The supplemental filing made on June 15, 1993, contains the Order of the PPUC approving this transaction.[5] This commission action addresses our concerns regarding state approval.

C. Public Interest

8. The petition states that the public interest will be served by grant of the waiver request. The proposed merger will result in no immediate change in rates to the existing customers; ALLTEL-PA will adopt the Brookville and

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[1] Public Notice, 8 FCC Rcd 4005 (Com. Car. Bur. 1993).

[2] 47 C.F.R. Part 36, Appendix-Glossary.

[3] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 18318 (November 15, 1984) (*Joint Board Recommended Decision);* 49 Fed. Reg. 48325 (December 12, 1984) (*Joint Board Order)* at para. 65.

[4] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990). The Commission therein describes the factors that led to the present restriction on study area changes and the reasons why it is proposing to change that restriction.

[5] Docket No. A-312050,F.2 adopted June 3, 1993. The PPUC addressed some accounting concerns that we need not consider here.

Murraysville respective tariffs.[6] We agree that the public interest is served by the merger of the two small telephone companies with the larger telephone company, including consolidation of the three study areas.

III. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the Petition of ALLTEL Service Corporation for waiver of Part 36, Appendix-Glossary, of the Commission's Rules IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran, Chief
Accounting and Audits Division
Common Carrier Bureau

[6] PPUC Order, *citing* PPUC Settlement petitions Nos. I-00920012 and I-00920013.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-36

In the Matter of

Federal Preemption of State
and Local Laws Concerning
Local Laws Concerning Amateur
Operator Use of Transceivers
Capable of Reception Beyond
Amateur Service Frequency
Allocations

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 1993; Released: September 3, 1993

By the Commission:

I. INTRODUCTION

1. On November 14, 1989, the American Radio Relay League, Incorporated (ARRL), filed a *Motion for a Declaratory Ruling*[1] requesting that the Commission preempt certain state statutes and local ordinances affecting transceivers[2] used by Amateur Radio Service licensees. The laws referenced by the ARRL prohibit the possession of such transceivers if they are capable of the reception of communications on certain frequencies other than amateur service frequencies. On March 15, 1990, we released a public notice[3] inviting comment on ARRL's request. In addition, on February 28, 1991, we released a *Notice of Inquiry*:[4] that solicited additional comment to assist us in making a decision in this matter. This *Memorandum Opinion and Order* grants the request to the extent indicated herein.

II. BACKGROUND

2. The ARRL motion discusses state statutes and local ordinances commonly known as "scanner laws," the violation of which may be a criminal misdemeanor with the possibility of equipment confiscation.[5] Specifically, ARRL notes that state statutes in New Jersey and Kentucky (which have subsequently been changed -- see paragraph 3, *infra)* prohibit the possession of a mobile short-wave radio capable of receiving frequencies assigned by the Commission for, *inter alia,* police use.[6] In addition, ARRL states that local ordinances exist throughout the United States that similarly prohibit the possession of such mobile short-wave radios without a locally-issued permit.[7] Therefore, ARRL explains, scanner laws can, *inter alia,* render amateur radio licensees traveling interstate by automobile vulnerable to arrest and to the seizure of their radio equipment by state or local police.[8]

3. Since the ARRL motion was filed with the Commission New Jersey repealed its statute and substituted a new, narrowly tailored scanner law that only applies in the criminal context.[9] In addition, Kentucky amended its statute by adding an exemption applying to amateur radio licensees.[10] As a result, there no longer appears to be any state scanner law with a deleterious effect on the legitimate operations of amateur radio service licensees. Nonetheless, the preemption issue raised by the ARRL motion remains timely because it appears that some local scanning ordinances remain in effect without safeguards to protect the legitimate use of such radios by our licensees.[11]

III. MOTION, INQUIRY AND COMMENTS

A. The ARRL Motion.

4. ARRL makes two arguments in support of preemption. First, it states that the receiver sections of the majority of commercially available amateur station transceivers can be tuned slightly past the edges of the amateur service bands to facilitate adequate reception up to the end of amateur service bands. ARRL seeks a preemption ruling that would permit amateur operators to install in vehicles transceivers that are capable of this "incidental" reception.[12] Although ARRL's formal request is couched in terms of this first, technical point, the request focuses almost entirely on a second, broader issue of whether state

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[1] The American Radio Relay League, Inc., Request for Declaratory Ruling Concerning the Possession of Radio Receivers Capable of Reception of Police or Other Public Safety Communications (November 13, 1989) (ARRL motion).

[2] Transceivers are radio equipment capable of both transmission and reception.

[3] Public Notice, 5 FCC Rcd 1981 (1990), 55 Fed. Reg. 10805 (March 23, 1990). Comments were due by May 16, 1990, and reply comments by May 31, 1990.

[4] 6 FCC Rcd 1305 (1991)(*Inquiry).*

[5] The scanner laws appear to be aimed at promoting the health, safety, and general welfare of the citizenry.

[6] *See generally* ARRL motion (citing N.J. Stat. Ann. § 2A: 127--4 (West 1985)(noting that a person is guilty of a misdemeanor for possessing or installing a short-wave radio in an automobile capable of receiving, *inter alia,* frequencies assigned for police use unless a permit has been issued therefor by the chief of the county or municipal police wherein such person resides) and Ky. Rev. Stat. Ann. § 432.570 (Michie/Bobbs-Merrill 1985) (noting that any person who possesses a mobile short-wave radio capable of receiving frequencies assigned for police use is guilty of a misdemeanor, except that certain users such as radio and television stations, sellers of the "scanner" radios, disaster and emergency personnel, and those using the weather radio service of the National Oceanic and Atmospheric Administration are exempt, while amateur radio licensees are not exempt).

[7] *See generally* ARRL motion (regarding, *inter alia,* a Kansas City, Missouri, scanner law). *See also* note 24, *infra.*

[8] *Id.*

[9] N.J. Stat. Ann. § 2C:33 -22 (West 1992).

[10] Ky. Rev. Stat. Ann. § 432.570(4)(c) (Baldwin 1992).

[11] *See* note 22, *infra.*

[12] ARRL Motion at 1, 3 and 5. "Most commercial amateur radio VHF and UHF transceivers ... are incidentally capable of reception (but not transmission) on frequencies additional to those allocated to the Amateur Radio Service. These frequencies are adjacent to amateur allocations. This is true even though the equipment is primarily designed for amateur bands, and results from the intentional effort to insure proper operation of the transceiver throughout the entire amateur band in question." *Id.* at 3.

and local authorities should be permitted, via the scanner laws, to prohibit the capability of radio reception by amateur operators on public safety and special emergency frequencies that are well outside the amateur service bands.

5. Concerning the broader issue, ARRL argues that amateur operators have special needs for broadscale "out-of-band" reception, and that the marketplace has long recognized these needs by offering accommodating transceivers. According to ARRL,[13] all commercially manufactured amateur service HF transceivers and the majority of such VHF and UHF transceivers have non-amateur service frequency reception capability well beyond the "incidental" -- they can receive across a broad spectrum of frequencies, including the police and other public safety and special emergency frequencies here at issue. This additional capability, argues ARRL, permits amateur operators to participate in a variety of safety activities, some in conjunction with the military or the National Weather Service. In both cases, reception on non-amateur frequencies is necessary. Such activities benefit the public, according to ARRL, especially in times of emergency,[14] and some require the mobile use of the amateur stations.[15] ARRL states that, in addition, the vast majority of amateur operators take part in these mobile activities, and that the widespread enforcement of scanner laws would render illegal the possession of virtually all modern amateur mobile equipment.[16] ARRL states that, as a result of scanner laws, "several dozen instances of radio seizure and criminal arrest [have been] suffered by licensed amateurs."[17]

B. The Inquiry and Comments.

6. The Commission's February 28, 1991 *Inquiry* solicited additional information concerning the technical and financial feasibility of modifying existing amateur service mobile transceivers to render them incapable of receiving police or other public safety channels. We also asked for information concerning the current and future marketplace availability of mobile equipment meeting the restrictions of the laws and whether there is value in having an available pool of wide-band, mobile amateur equipment in the United States to meet emergency needs.

7. In response to the *Inquiry*, we received 115 comments and reply comments, of which the great majority are from individual amateurs who support preemption.[18] One commenter, the Michigan Department of State Police, states that although it cooperates with the amateur service during emergencies, it is concerned about isolated incidents of apparently unlawful actions taken by amateur licensees upon receipt of public safety communications outside of the amateur radio band.[19] Therefore, it concludes that "there can be no beneficial need for amateur radio equipment to tune in public safety channels."[20] Of the remaining comments received, only a few address the technical and marketplace questions described above. These comments are from individual amateur operators[21] who state that existing wide-band transceivers cannot be modified to meet the restrictions of the scanner laws without substantial expense and that this situation will continue as new equipment becomes available. Despite our specific request in the *Inquiry* that manufacturers comment on these technical and financial questions, no manufacturer chose to respond on these points. We also received a few comments describing the prevalence of scanner laws nationwide.[22] Finally, the National Communications System (NCS), of the Department of Defense, states in its comment that the federal government utilizes amateur operators in a number of programs requiring mobile, wide-band transceivers.[23]

IV. DISCUSSION

8. There are three ways state and local laws may be preempted. First, Congress may expressly preempt the state or local law. Second, Congress may, through legislation, clearly indicate its intent to occupy the field of regulation, leaving "no room for the States to supplement."[24] Last, and most important for this discussion,

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[13] *Id.* at 12.

[14] For example, amateur radio licensees were widely recognized as serving a vital role in providing communications from devastated areas of South Florida during Hurricane Andrew and its aftermath in 1992.

[15] *See generally* House Comm. on the Judiciary, Electronic Communications Privacy Act of 1986, H.R. Rep. No. 647, 99th Cong., 2d Sess. 42.

[16] ARRL motion at 2 and 12. As of February 28, 1993, the Commission's licensing database indicates that there are 598,656 amateur stations in the United States and its territories and possessions.

[17] *Id.* at 11.

[18] A list of commenters is provided in the Appendix. Further, we have accepted a comment from Communications Electronics, Inc., which was filed one day late. *See generally* 47 C.F.R. § 1.46(b). We also have considered 45 comments filed previously in this proceeding. *See Inquiry*, 6 FCC Rcd at 1306-1308 (noting that all of the filed comments support the ARRL motion). In addition, we received comments from scanner (receive-only equipment) users, who are not federal licensees and whose interests have not been at issue in this proceeding.

[19] Comment of State of Michigan, Department of State Police, at 2-3 (June 3, 1991). *But see* Reply Comments of Personal Radio Steering Group of Ann Arbor, Michigan (July 8, 1991)(noting that ARRL has not requested the preemption of state and local laws that proscribe unlawful actions taken by amateur licensees).

[20] Comment of State of Michigan, *supra*, at 2-3. *But see* paragraph 12, n. 40, *infra* (noting the comments supporting preemption filed previously in this proceeding by the Associated Public Safety Communications Officers (APCO)).

[21] *See, e.g.,* Comment of John F. Fuhrman at 4 (April 29, 1991), Comment of Joseph Reymann at 9, 14 (May 24, 1991), and Comment of Mark D. Tavaglini at 3 (July 5, 1991).

[22] *See, e.g.,* Comment of ARRL at 12 & n.6 , 14 (June 7, 1991); Comment of Association of North American Radio Clubs at 5 (April 30, 1990); Comment of Radio Communications Monitoring Association at 5 (June 6, 1991). With respect to scanner laws at the local level, ARRL has notes that it is difficult to determine the precise number of such ordinances. *See* Comment of ARRL at 12 (June 7, 1991); *See also* Letter from ARRL to the Chief, Private Radio Bureau, Federal Communications Commission, Washington, D.C. (May 26, 1993)(noting local scanner laws in effect in Newton and Overland Park, Kansas, Jersey City, New Jersey, and Kansas City, Missouri).

[23] Comment of National Communications System at 2-4 (June 7, 1991).

[24] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699-705 (1984) (*quoting* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

> [e]ven where Congress has not completely displaced state regulation in a specific area, state law [may be] nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," ... or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[25]

Furthermore, "[f]ederal regulations have no less preemptive effect than federal statutes."[26]

9. The amateur service is regulated extensively under Part 97 of the Commission's Rules, 47 C.F.R. Part 97. As we have stated in the past:

> [T]here is ... a strong federal interest in promoting amateur communications. Evidence of this interest may be found in the comprehensive set of rules that the Commission has adopted to regulate the amateur service. Those rules set forth procedures for the licensing of stations and operators, frequency allocations, technical standards which amateur radio equipment must meet and operating practices which amateur operators must follow. We recognize the Amateur Radio Service as a voluntary, noncommercial communication service, particularly with respect to providing emergency communications. Moreover, the Amateur Radio Service provides a reservoir of trained operators, technicians and electronic experts who can be called on in times of national or local emergencies. By its nature, the Amateur Radio Service also provides the opportunity for individual operators to further international goodwill.[27]

This federal interest in the amateur service is also reflected in Section 97.1 of our rules, 47 C.F.R. § 97.1, which provides that the amateur service exists to "continu[e] and exten[d] ... the amateur's proven ability to contribute to the advancement of the radio art."[28] This regulatory purpose is consistent with the Communications Act requirement that "[i]t shall be the policy of the United States to encourage the provision of new technologies to the public."[29]

10. The strong federal interest in the preservation and advancement of the amateur service is also demonstrated by Congress's recent recognition of the goals of the amateur service in a "Sense of Congress" provision in which Congress strongly encouraged and supported the amateur service.[30] Congress therein directed all Government agencies to take into account the valuable contribution of amateurs when considering actions affecting the amateur radio service.[31] We believe that the strong federal interest in supporting the emergency services provided by amateurs cannot be fully accomplished unless amateur operators are free to own and operate their stations to the fullest extent permitted by their licenses and are not unreasonably hampered in their ability to transport their radio transmitting stations across state and local boundaries for purposes of transmitting and receiving on authorized frequencies. Indeed, as a result of advances in technology making smaller, lighter weight radios commercially available, the Commission has expressly amended its rules to facilitate and en-

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[25] Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (*quoting* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); *see* Capital Cities Cable, Inc. v. Crisp, 467 U.S. at 705-09.

[26] Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. at 153.

[27] *Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities*, 101 FCC 2d 952, 959-60 (1985) (concerning amateur radio antenna restrictions)(*Amateur Preemption Order*). *See* 47 C.F.R. § 97.1. *See also* Note, Federal Preemption of Amateur Radio Antenna Height Regulation: Should the Sky Be the Limit?, 9 Cardozo L. Rev. 1501, 1517-19 (1988), Note, Local Regulation of Amateur Radio Antennae and the Doctrine of Federal Preemption: The Reaches of Federalism, 9 Pac. L.J. 1041, 1055-60 (1978).

[28] 47 C.F.R. § 97.1(b).

[29] 47 U.S.C. § 157(a).

[30] SENSE OF CONGRESS

Sec. 10

(a) The Congress finds that --

(1) more than four hundred and thirty-five thousand four hundred radio amateurs in the United States are licensed by the Federal Communications Commission upon examination in radio regulations, technical principles, and the international Morse code;

(2) by international treaty and the Federal Communications Commission regulation, the amateur is authorized to operate his or her station in a radio service of intercommunications and technical investigations solely with a personal aim and without pecuniary interest;

(3) among the basic purposes for the Amateur Radio Service is the provision of voluntary, noncommercial radio service, particularly emergency communications; and

(4) volunteer amateur radio emergency communications services have consistently and reliably been provided before, during, and after floods, tornadoes, forest fires, earthquakes, blizzards, train wrecks, chemical spills, and other disasters.

(b) It is the sense of Congress that --

(1) it strongly encourages and supports the Amateur Radio Service and its emergency communications efforts; and

(2) Government agencies shall take into account the valuable contributions made by amateur radio operators when considering actions affecting the Amateur Radio Service.

Federal Communications Commission Authorization Act of 1988, Pub. L. No. 100-594, 102 Stat. 3021, 3025 (November 3, 1988); *see also* Joint Explanatory Statement of the Committee of Conference on H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 415, 433 (November 21, 1989), *reprinted in* 1990 U.S. Code Cong. & Admin. News 3018, 3037 (amateur licensees exempted from new Commission-wide fees program because "[t]he Conferees recognize that amateur licensees do not operate for profit and can play an important public safety role in times of disaster or emergency"), Joint Explanatory Statement of the Committee of Conference on H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 18-19 (August 19, 1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 2261, 2262-63.

[31] *Id.*

courage unrestricted mobile amateur operations. As we noted in a recent rule making proceeding to modify the rules governing the amateur radio service,

> [I]n the age of the microprocessor and the integrated circuit [amateur] equipment is highly portable. It is common for amateur operators to carry hand-held transceivers capable of accessing many local repeaters in urban areas and also capable of reasonably good line-of-sight communication. It appears that the concept of fixed station operation no longer carries with it the same connotation it did previously. For this reason, we propose to delete current rules that relate to station operation away from the authorized fixed station location.[32]

As a consequence of these changes, the rules now expressly authorize amateur service operation "at points where the amateur service is regulated by the FCC," that is, at fixed and mobile locations throughout the United States. Furthermore, the Commission's Rules do not in any way prohibit an amateur service transceiver from having out-of-band reception capability.[33]

11. Against this background, we conclude that certain state and local laws, as described below, conflict with the Commission's regulatory scheme designed to promote a strong amateur radio service. Scanner laws that prohibit the use of transceivers that transmit and receive amateur frequencies because they also receive public safety, special emergency or other radio service frequencies frustrate most legitimate amateur service mobile operations through the threat of penalties such as fines and the confiscation of equipment. As noted by ARRL, virtually all modern amateur service equipment in use today can receive transmissions on the public safety and special emergency frequencies at issue, and the majority of amateur stations[34] are operated in a mobile fashion. Consequently, the mobile operations of the vast majority of amateurs are affected by such laws. In addition, the record statements by amateurs that the costs would be substantial to modify existing transceivers are unchallenged. The scanner laws, then, essentially place the amateur operator in the position of either foregoing mobile operations by simply avoiding all use of the equipment in vehicles or other locations specified in the laws, or risking fines, or equipment confiscation. This very significant limitation on amateurs operating rights runs counter to the express policies of both Congress and the Commission to encourage and support amateur service operations, including mobile operations, and impermissibly encroaches on federal authority over amateur operators.[35] It conflicts directly with the federal interest in amateur operators being able to transmit and receive on authorized amateur service frequencies.[36]

12. For these reasons, we find it necessary to preempt state and local laws that effectively preclude the possession in vehicles or elsewhere of amateur service transceivers by amateur operators merely on the basis that the transceivers are capable of reception on public safety, special emergency, or other radio service frequencies, the reception of which is not prohibited by federal law.[37] We find that, under current conditions and given the types of equipment available in the market today, such laws prevent amateur operators from using their mobile stations to the full extent permitted under the Commission's Rules and thus are in clear conflict with federal objectives of facilitating and promoting the Amateur Radio Service. We recognize the state law enforcement interest present here, and we do not suggest that state regulation in this area that reasonably attempts to accommodate amateur communications is preempted.[38] This decision does not pertain to scanner laws narrowly tailored to the use of such radios, for example, for criminal ends such as to assist flight from law enforcement personnel. We will not, however, suggest the precise language that must be contained in state and local laws. We do find that state and local laws must not restrict the possession of amateur transceivers simply because they are capable of reception of public safety, special emergency or other radio service frequencies, the reception of which is not prohibited by federal law, and that a state or local permit scheme will not save from preemption an otherwise objectionable law.[39] Finally, we note, as stated by APCO in comments filed previously in this proceeding, that any

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[32] *Reorganization and Deregulation of Part 97 of the Rules Governing the Amateur Radio Services, Notice of Proposed Rule Making*, 3 FCC Rcd 2076, 2077, (1988), final rules adopted in *Report and Order*, 4 FCC Rcd 4719 (1989), aff'd in *Memorandum Opinion and Order*, 5 FCC Rcd 4614 (1990).

[33] The rules, however, do prohibit amateur service *transmissions* outside of the allocated amateur service bands. 47 C.F.R. § 97.307(b); Public Notice, Extended Coverage Transceivers in the Amateur Radio Service, mimeo no. 4114 (July 21, 1987)(noting that "[i]t is a violation of the Commission's regulations to ... transmit on a frequency allocated to a licensed service without the appropriate Commission-issued station license.").

[34] *See* para. 5, n.16, *supra*.

[35] *Cf.* Capital Cities Cable, Inc. v. Crisp, 467 U.S. at 711 (state ban on alcoholic beverages commercials preempted where compliance by cable companies might result in deletion of out-of-state programming, thereby frustrating federal goal of promoting programming variety).

[36] *See Amateur Preemption Order*, 101 FCC2d at 960 (ordinances that "operate to preclude amateur operations in their communities are in direct conflict with federal objectives and must be preempted").

[37] We note that federal law prohibits unauthorized reception on frequencies of certain radio services, *e.g.*, cellular radio. *See* Electronic Communications Privacy Act of 1986, §§ 101(a)(1), 101(a)(6), 101(c), 18 U.S.C. §§ 2510(1), 2510(10), 2510(16)(D), 2511(1), House Comm. on the Judiciary, Electronic Communications Privacy Act of 1986, H.R. Rep. No. 647, 99th Cong., 2d Sess. 31-33, 37.

[38] *See Amateur Preemption Order*, 101 FCC2d at 960 (state and local regulations regarding amateur antennas based on health, safety or aesthetic considerations "must be crafted to accommodate reasonably amateur communications and to represent the minimum practicable regulation to accomplish the local authority legitimate purpose").

[39] The possibility that an affected licensee might obtain an additional authorization or permit to operate under the state or local law does not ameliorate the conflict, because the state or local issuing authority might choose to deny the amateur operator the permit, or charge a fee for the permit, or require the permit even of a non-resident.

public safety agency that desires to protect the confidentiality of its communications can do so through the use of technology such as scrambling or encryption.[40]

V. CONCLUSION

13. We hold that state and local laws that preclude the possession in vehicles or elsewhere of amateur radio service transceivers by amateur operators merely on the basis that the transceivers are capable of the reception of public safety, special emergency, or other radio service frequencies, the reception of which is not prohibited by federal law, are inconsistent with the federal objectives of facilitating and promoting the amateur radio service and, more fundamentally, with the federal interest in amateur operators' being able to transmit and receive on authorized amateur service frequencies. We therefore hold that such state and local laws are preempted by federal law.

14. Accordingly, IT IS ORDERED that the request for a declaratory ruling filed by the ARRL IS GRANTED to the extent indicated herein and in all other respects IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Comments or reply comments to the *Inquiry* were submitted by the following parties:

70 individual amateur operators, some of whom also operate GMRS equipment or use scanning receivers

2 individual General Mobile Radio Service (GMRS) operators

13 individual scanning receiver users

American Radio Relay League, Inc. (ARRL)

Associated Public-Safety Communications Officers, Inc. (APCO)

Bellcore Pioneers Amateur Radio Association

Big Spring/Howard County, Texas; Hal Boyd, Emergency Coordinator

C. Crane Company

Capital Cities/ABC, Inc.

City of Martinez, California; Gerald W. Boyd, Chief of Police

Communications Electronics, Inc.

County of Sussex, New Jersey; John Ouweleen, Emergency Management Coordinator

CQ Communications, Inc.

Egyptian Radio Club, Inc.

Grove Enterprises, Inc.

Jessamine Amateur Radio Society

National Communications System (NCS), Department of Defense

Pasco County, Florida; Edith L. Sanders, Disaster Preparedness Coordinator

Personal Radio Steering Group, Inc. (PRSG)

Radio Communications Monitoring Association (RCMA)

Riverside County R.E.A.C.T.

Seminole County, Florida; Kenneth M. Roberts, Emergency Management Coordinator

State of Michigan, Department of State Police; David H. Held, Director, Communications Section

Tandy Corporation

[40] *See* Comments of APCO at 2-3 (May 16, 1990)(summarized in *Inquiry*, 6 FCC Rcd at 1306.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements
for Cost Support Material
To Be Filed with Local
Transport Tariffs

ORDER

Adopted: August 20, 1993; Released: August 20, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This Order sets forth certain requirements for summary cost support material that local exchange carriers (LECs) must file to support their switched transport tariff filings[1] on or before September 1, 1993 in partial fulfillment of the requirements established in Sections 61.38 and 61.41 through 61.49 of the Commission's Rules.[2] All Tier 1 LECs, and all non-Tier 1 LECs that have received a *bona fide* request for direct-trunked transport service[3] are subject to these requirements.[4] Specific data formats are detailed in the Tariff Review Plans (TRPs) that are appended to this Order. The TRPs consist of (1) a Price Cap TRP, which is a revised version of the standard TRP used by price cap companies[5] for annual filings and other price cap filings, as modified for rule changes adopted in the *Transport Orders* (Appendix A); and (2) a Supplemental TRP, which is designed to be used only for this filing. The Supplemental TRP describes information necessary to verify the computations of switched transport charges under the new rate structure required by the *Transport Orders*. There are two slightly different versions of the Supplemental TRP. One version is for companies subject to price cap regulation (Appendix B); a second version is for those companies subject to rate-of-return regulation (Appendix C). Thus, price cap companies must file both the Price Cap TRP and the Supplemental TRP for price cap companies, while companies subject to rate of return regulation need only file the Supplemental TRP for rate of return companies. The TRPs display basic demand, rate, and cost information in a manner that is consistent for all LECs required to file tariffs, thereby aiding review of the LECs' filings by the Commission and interested parties.

II. BACKGROUND

2. In the *Transport Orders*, the Commission adopted interim rules to govern the rate structure and pricing of interstate switched access transport service provided by LECs to enable interexchange carriers (IXCs) to originate and terminate interstate traffic. The Commission required that the local transport rate element be disaggregrated into several components, that such disaggregation result in rates that would be revenue neutral (*i.e.*, rates that would produce the same revenue as would have been obtained under rates being replaced), and, for price cap companies, that the disaggregration be made under price cap rules for restructured services. The interim rate structure consists of: (1) entrance facilities charges; (2) direct-trunked transport charges; (3) dedicated signalling transport charges; (4) tandem-switched transport charges and tandem switching charges; and (5) an interconnection charge.[6] In addition, for price cap companies, one of the price cap service categories is to be restructured. The local transport service category is to be replaced by a direct-trunked transport service category (which includes entrance facilities and dedicated signalling transport), a tandem-switched transport service category (which includes tandem switching), and an interconnection charge category.

3. The Commission concluded that initial entrance facilities rates and direct-trunked transport rates will be presumed reasonable if based on the non-discounted rates for equivalent special access offerings as of September 1, 1992, provided that such rates satisfy a benchmark DS3-to-DS1

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[1] *See* Transport Rate Structure and Pricing, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 91-213, 7 FCC Rcd 7006 (1992) (*Transport Order);* Transport Rate Structure and Pricing, CC Docket No. 91-213, FCC 93-366, First Memorandum Opinion & Order on Reconsideration, released July 21, 1993 (*First Reconsideration Order);* and Transport Rate Structure and Pricing, CC Docket No. 91-213, FCC 93-403, Second Memorandum Opinion and Order on Reconsideration, released August 18, 1993 (*Second Reconsideration Order);* (collectively referred to as *Transport Orders).* These Orders revised the rate structure and pricing of switched transport service in order to encourage efficient use of the access network.

[2] 47 C.F.R. Sections 61.38 and 61.41 through 61.49. Compliance with the requirements set forth in this Order does not ensure acceptance of carriers' access charge tariffs, nor does it replace total support material requirements. Carriers remain obligated to provide adequate supporting documentation for their access charges.

[3] For a description of direct-trunked transport, see below.

[4] *Transport Order* at para. 90-94 and *First Reconsideration Order* at para. 60.

[5] Price cap companies are those companies subject by Commission order or by election to Sections 61.41 through 61.49 of the Commission's Rules.

[6] Entrance facilities charges recover costs for transmission between the IXC's point of presence (POP) and the LEC office serving the POP, called a serving wire center (SWC). Direct-trunked transport charges recover costs for transmission of traffic between the LEC's SWC and a LEC's end office (or between any two LEC offices) in cases where no tandem switching is involved. Tandem-switched transport charges recover costs for tandem-switched transmission of traffic between the LEC's SWC (or tandem office) and a LEC's end office, exclusive of the costs of the tandem switch. The tandem switching charge recovers costs for use of the tandem switch by tandem-switched transport. Dedicated signalling charges recover the costs for out-of-band common channel signalling. The interconnection charge recovers residual transport revenues and applies to all interstate access customers that interconnect with the LEC switched access network. Flat monthly charges apply to entrance facilities, direct-trunked transport, and dedicated signalling, while usage-sensitive charges apply to tandem-switched transport, tandem switching, and the interconnection charge.

ratio of 9.6-to-1.[7] The dedicated signalling transport rates will be presumed reasonable to the extent that they are based on previous tariffs or the special access rate for equivalent facilities.[8] Initial tandem-switched transport rates will be presumed reasonable if set as a per-minute equivalent of direct-trunked transport, based on a weighted average of DS3 and DS1 rates.[9] The Commission requires that initial tandem switching rates be priced to recover 20 percent of the interstate transport revenue requirement for tandem switches.[10] The Commission further requires that the interconnection charge be priced on a residual basis to ensure revenue neutrality with the replaced rates.[11]

III. TARIFF REVIEW PLANS

4. Based on our experience in reviewing the LECs' interstate access tariffs, we believe that review of these transport tariffs would be facilitated by provision of certain basic data in a computerized, uniform format. In the *Transport Order*, the Commission required all LECs to fully implement the interim rate structure. The Commission reconsidered that requirement, however, and required non-Tier 1 LECs[12] to fully implement the interim rate structure only upon receipt of a *bona fide* request for direct-trunked transport.[13] Accordingly, all Tier 1 LECs, and all non-Tier 1 LECs that have received a *bona fide* request for direct-trunked transport service, shall include the applicable Supplemental TRP as cost support for their interim transport rates.[14] If NECA files fully restructured transport rates, NECA should include a Supplemental TRP as cost support for its interim transport rates. All price cap LECs should include, in addition, the Price Cap TRP with their filing. We note that these TRPs were developed after informal discussions with representatives of the LECs.

5. The Price Cap TRP (Appendix A) is a modified version of the price cap TRP adopted in *1993 Annual Access TRP Order*.[15] It differs from the earlier version only in that the local transport service category has been restructured into the direct-trunked transport service category, the tandem-switched transport service category, and the interconnection charge service category. The Supplemental TRP (Appendices B and C) includes charts to show the derivation of entrance facilities charges, direct-trunked transport charges, the benchmark DS3 to DS1 ratio, tandem-switched transport charges (including the tandem switching charge), dedicated signalling transport charges, and the interconnection charge. The Supplemental TRP for Rate of Return Companies (Appendix C) differs from the Supplemental TRP for Price Cap Companies (Appendix B) only by slight variations in the derivations for entrance facilities charges, direct-trunked transport charges, and the interconnection charge.

IV. CERTIFICATION

6. The LECs must certify the accuracy of data that are submitted in support of rates by including a signed statement that the support data are true, correct, and complete. Certification is required for all data submitted in support of revised rates, including all data that are required by the TRP. The text of the certification is the same as that required in the annual access tariff filings. The certification should be displayed as the last page in the binder containing each company's TRP.

V. TECHNICAL REQUIREMENTS

7. LECs required to file TRPs must file their TRPs in both hard-copy and computerized form. A spreadsheet for this purpose will be made available to all companies and other interested parties. Rates should be entered with the same number of decimal places as appear in the company's tariff. Demand should be provided in units, and cost information should be provided in thousands.

VI. COMPLIANCE WITH THE PAPERWORK REDUCTION ACT

8. In compliance with the Paperwork Reduction Act, we estimate burden-hours and place the Office of Management and Budget form number and date on the formats included with this Order. We also note that this TRP was developed after informal discussions with LECs. By adoption of this Order, we have endeavored to minimize the paperwork burden placed on the LECs by adoption of uniform and standardized cost support guidelines.

VII. PROCEDURAL REQUIREMENTS

9. This Order will be sent directly to all carriers that will file revised transport rates on or before September 1, 1993. Companies must file two copies of their cost support, including the TRP, in both hard copy and computer diskette format, with the Tariff Division. In addition, companies must file one copy of their cost support, including

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[7] *Transport Order* at para. 52. *See also* Section 69.108 of the Rules.

[8] *Transport Order* at para. 100. *See also* Section 69.125 of the Rules.

[9] *Transport Order* at para 56. *See also* Section 69.111(b) of the Rules.

[10] *Transport Order* at para. 59 and *First Reconsideraton Order* at para. 45. *See also* Section 69.111(g) of the Rules.

[11] *Transport Order* at para. 61-64; *First Reconsideration Order* at paras. 51-55; and *Second Reconsideration Order*. *See also* Section 69.124 of the Rules.

[12] Non-Tier 1 companies are those companies having annual revenues from regulated telecommunications operations of less than $100 million; Tier 1 companies are those companies having annual revenues from regulated telecommunications operations of $100 million or more. The initial classification of a company is determined by its lowest annual operating revenues for the five immediately preceding years. Subsequent changes in classification are made when annual operating revenue shows a greater or lesser classification for five consecutive years. *See* Sections 32.11(a) and (e) of the Commission's Rules (distinguishing Class A and Class B telephone companies, which are synonymous with Tier 1 and Tier 2 companies, respectively).

[13] *First Reconsideration Order* at para. 60.

[14] Non-Tier 1 LECs that have not received a bona-fide request for direct-trunked transport service are nevertheless required to file rates for entrance facilities. *See First Reconsideration Order* at para. 60 (but exempting equal access providers from a filing requirement for entrance facilities, because they do not provide such facilities). Although we do not require such companies to include a TRP as part of the cost support for their rates, such companies must provide adequate cost support pursuant to Section 61.38 of the Rules.

[15] Commission Requirements for Cost Support Material To Be Filed with 1993 Annual Access Tariffs, Order, DA 93-192, released February 18, 1993 (*1993 Annual Access TRP Order*).

the TRP, in both hard copy and computer diskette format, with the Commission's official commercial contractor, International Transcription Services, Inc. (ITS). A copy of the Order and all appendices will be available for inspection at the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. The Commission will publish the text of this Order in the FCC Record. Those parties wishing to obtain copies of the appendices can do so through the Commission's contractor for public records duplication.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

Appendix A

Price Cap
Tariff Review Plan

Approved by OMB
3060-0575
Expires 11/30/93
See below for information regarding public
burden estimate

NOTICE: The Tariff Review Plan (TRP) contains requirements for summary cost support material that certain local exchange carriers (LECs) must file to support their local tranpsort charge tariff filings in partial fulfillment of Sections 61.38 and 61.44 through 61.49 of the Commission's Rules. The TRPs specify basic cost, rate, and demand information in a consistent format and are essential components of the Commission's access tariff review process. The information in the TRP is used by the FCC to evaluate rates. Your response is mandatory. Public reporting burden for this collection of information is estimated to average 12 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Office of Managing Director, Washington, DC 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC, 20503.

IND – 1
Filing Entity: TEST
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1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Indexes

		PROPOSED PCI	PROPOSED API	PROPOSED SBI	UPPER SBI LIMIT	LOWER SBI LIMIT	EXISTING PCI	EXISTING API	EXISTING SBI	6/30/93 PCI	6/30/93 SBI
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)
	Common Line Basket										
100	Total Common Line		N/A	N/A	N/A	N/A		N/A	N/A		N/A
	Traffic Sensitive Basket										
110	Local Switching	N/A	N/A				N/A	N/A		N/A	
121	Interconnection Charge	N/A	N/A				N/A	N/A		N/A	
122	Tandem Switched Transport	N/A	N/A				N/A	N/A		N/A	
126	Direct Trunked Transport	N/A	N/A				N/A	N/A		N/A	
130	Information	N/A	N/A				N/A	N/A		N/A	
140	Database Access	N/A	N/A				N/A	N/A		N/A	
142	800 DB VertFeatures SUB – CAT	N/A	N/A				N/A	N/A		N/A	
150	Total Switched Access			N/A	N/A	N/A			N/A		N/A
	Special Access Basket										
160	Voice Grade, Wats, Metallic & Telegraph	N/A	N/A				N/A	N/A		N/A	
170	Audio & Video	N/A	N/A				N/A	N/A		N/A	
180	High Caps & DDS	N/A	N/A				N/A	N/A		N/A	
190	DS – 1 SUB – CAT	N/A	N/A				N/A	N/A		N/A	
200	Density Zone 1	N/A	N/A				N/A	N/A		N/A	
210	Density Zone 2	N/A	N/A				N/A	N/A		N/A	
220	Density Zone 3	N/A	N/A				N/A	N/A		N/A	
230	DS – 3 SUB – CAT	N/A	N/A				N/A	N/A		N/A	
240	Density Zone 1	N/A	N/A				N/A	N/A		N/A	
250	Density Zone 2	N/A	N/A				N/A	N/A		N/A	
260	Density Zone 3	N/A	N/A				N/A	N/A		N/A	
270	Wideband	N/A	N/A				N/A	N/A		N/A	
280	Total Special Access			N/A	N/A	N/A			N/A		N/A
	Interexchange Basket										
290	Total Interexchange			N/A	N/A	N/A			N/A		N/A

NOTES (1) Display indexes as percents to four decimal places (e g , display 1 00 as 100 0000).
(2) For the annual access filing, Column (I) will equal Column (F) and Column (J) will equal Column (H).

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1993 Initial Transport Restructure Filing
Price Caps Tariff Review Plan
CALCULATION OF CARRIER COMMON LINE RATE CAP

		DATA
		(A)
	Step 1:	
100	Terminating CCL Premium MOU	
110	Terminating CCL Non-Premium MOU	
120	Chargeable Terminating CCL MOU	
130	Originating CCL Premium MOU	
140	Originating CCL Non-Premium MOU	
150	Chargeable Originating CCL MOU	
160	Terminating CCL Prem Capped Rates at last PCI Update	
170	Originating CCL Premium Capped Rates at last PCI Update	
180	Multiline Business EUCL Lines	
190	Res & Single Line Business EUCL Lines	
200	Lifeline Lines	
210	Special Access Surcharge Lines	
220	Multiline Business EUCL Rates at last PCI Update	
230	Res & Single Line Business EUCL Rates at last PCI Update	
240	Lifeline Rates at last PCI Update	
250	Special Access Surcharge Rates at last PCI Update	
255	Other Common Line Revenue	
260	CL Revenue at capped (t-1) rates	
	Step 2:	
270	CL Revenue at capped (t-1) rates	
280	CCL MOU for Base Year	
290	CL Rev/MOU (t-1)	
	Step 3:	
300	CL PCI (t)	
310	CL PCI (t-1)	
320	1 + % Change CL PCI	
330	CL Rev/MOU (t)	
	Step 4:	
340	Base Demand * Proposed SLCs + Other Common Line Proposed Revenue	
350	CCL MOU for Base Year	
360	1+g/2	
370	SLC Rev/MOU (t)	
380	CCL Rev/MOU (t)	
	Step 5:	
390	CCL MOU for Base Year	
400	CCL Rev at CCL Rev/MOU (t)	
410	Chargeable Originating MOU	
420	Originating CCL Rev (Rate = $0.01)	
430	Residual CCL Revenue	
440	Chargeable Terminating MOU	
450	Hypothetical Premium Terminating Rate Cap #1 (Prem Orig = $0.01)	
460	Total Chargeable MOU	
470	Hypothetical Premium Terminating Rate Cap #2 (if #1 < $0.01)	
480	Premium Terminating Rate Cap	

NOTES: (1) Display indexes on rows 300 and 310 as percents to four decimal places.
(e.g., display 100% as 100.0000).
(2) Display factors in rows 320 and 360 to six decimal places
(e.g., display 1 as 1.000000).
(3) Display revenues, lines, and minutes as whole numbers.

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
PCI Components

		COMMON LINE BASKET	TRAFFIC SENSITIVE BASKET	SPECIAL ACCESS BASKET	INTER-EXCHANGE BASKET
		(A)	(B)	(C)	(D)
100	GNP-PI				
110	Productivity Factor (X)				
120	GNP-PI - X				
130	Y(t-1)	N/A	N/A	N/A	
140	Delta Y	N/A	N/A	N/A	
150	Delta Z				
160	R(t-1)				
170	Delta Y/R	N/A	N/A	N/A	
180	Delta Z/R				
190	W				
200	W*(GNP-PI - X)	N/A			
210	Growth in Min./Line (G)		N/A	N/A	N/A
220	W*[GNP-PI - X - (G/2)] / [1 + (G/2)]	---	N/A ---	N/A ---	N/A ---
230	Existing PCI				
240	Proposed PCI				

NOTES: (1) Display indexes and factors as percent to four decimal places (e.g., display 100% as 100.0000).
(2) Display revenues as whole numbers.
(3) Rows 130 and 160 are computed by multiplying base period quantities by the corresponding rates at the last time the PCI was updated.

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Filing Entity: TEST
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1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Price Out Summary

		BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	BASE PER DMD x CURR RATES minus BASE PER DMD x RATES AT LAST PCI UPDATE	BASE PER DMD x PROP RATES minus BASE PER DMD x CURRENT RATES
		(A)	(B)	(C)	(D) = (B) – (A)	(E) = (C) – (B)
	Common Line Basket					
100	End User Common Line					
110	Carrier Common Line					
120	Total Common Line					
	Traffic Sensitive Basket					
130	Local Switching					
141	Interconnection Charge					
145	Tandem Switched Transport					
149	Direct Trunked Transport					
150	Information					
160	Database Access					
170	Total Switched Access					
	Special Access Basket					
180	Voice Grade, Wats, Metallic & Telegraph	---	---	---	---	---
190	Audio & Video					
200	High Caps & DDS					
210	Wideband					
220	Total Special Access					
	Interexchange Basket					
230	Total Interexchange					

Note: Display whole numbers.

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EXG – 1
Filing Entity: TEST
Page 1.1 of 4

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Exogenous Cost Changes
COMMON LINE

		SPF TRANSITION	DEM TRANSITION	LTS / TRS	INSIDE WIRE	RESERVE DEFICIENCY AMORTIZATIONS	EXCESS DEFERRED TAXES	ITC AMORTIZATIONS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)
	REVENUE EFFECT							
100	Depreciation Expense			N/A				
110	Expense less Depreciation			N/A				
120	Taxes less F.I.T.			N/A				
130	Net Return			N/A				
140	F.I.T.			N/A				
150	Uncollectible Rev. & Other Adj.	---	---	N/A ---	---	---	---	---
160	Revenue Effects							
	RATE BASE							
170	Total Plant in Service			N/A				
180	Other Rate Base Items			N/A				
190	Depreciation Reserve			N/A				
200	Accum. Deferred Inc. Tax			N/A				
210	Net Rate Base			N/A				

NOTE: (1) Total may not equal sum of changes due to interactive effects.
(2) Display whole numbers.

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EXG–1
Filing Entity: TEST
Page 1.2 of 4

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Exogenous Cost Changes
COMMON LINE

		REMOVAL OF SHARING / LOW END ADJUSTMENT	REVISION TO SHARING / LOW END ADJUSTMENT	SHARING / LOW END ADJUSTMENT	OTHER	TOTAL
		(H)	(I)	(J)	(K)	(L)
	REVENUE EFFECT					
100	Depreciation Expense	N/A	N/A	N/A		N/A
110	Expense less Depreciation	N/A	N/A	N/A		N/A
120	Taxes less F.I.T.	N/A	N/A	N/A		N/A
130	Net Return	N/A	N/A	N/A		N/A
140	F.I.T.	N/A	N/A	N/A		N/A
150	Uncollectible Rev. & Other Adj.	N/A	N/A	N/A		N/A
160	Revenue Effects	---	---	---	---	---
	RATE BASE					
170	Total Plant in Service	N/A	N/A	N/A		N/A
180	Other Rate Base Items	N/A	N/A	N/A		N/A
190	Depreciation Reserve	N/A	N/A	N/A		N/A
200	Accum. Deferred Inc. Tax	N/A	N/A	N/A		N/A
210	Net Rate Base	N/A	N/A	N/A		N/A

NOTE: (1) Total may not equal sum of changes due to interactive effects.
(2) Display whole numbers.

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EXG – 1
Filing Entity: TEST
Page 2.1 of 4

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Exogenous Cost Changes
TRAFFIC SENSITIVE

		SPF TRANSITION	DEM TRANSITION	LTS / TRS	INSIDE WIRE	RESERVE DEFICIENCY AMORTIZATIONS	EXCESS DEFERRED TAXES	ITC AMORTIZATIONS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)
	REVENUE EFFECT							
300	Depreciation Expense			N/A				
310	Expense less Depreciation			N/A				
320	Taxes less F.I.T.			N/A				
330	Net Return			N/A				
340	F.I.T.			N/A				
350	Uncollectible Rev. & Other Adj.	---	---	N/A ---	---	---	---	---
360	Revenue Effects			N/A				
	RATE BASE							
370	Total Plant in Service			N/A				
380	Other Rate Base Items			N/A				
390	Depreciation Reserve			N/A				
400	Accum. Deferred Inc. Tax			N/A				
410	Net Rate Base			N/A				

NOTE: (1) Total may not equal sum of changes due to interactive effects.
(2) Display whole numbers.

6429

EXG – 1
Filing Entity: TEST
Page 2.2 of 4

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Exogenous Cost Changes
TRAFFIC SENSITIVE

		REMOVAL OF SHARING / LOW END ADJUSTMENT	REVISION TO SHARING / LOW END ADJUSTMENT	SHARING / LOW END ADJUSTMENT	OTHER	TOTAL
	REVENUE EFFECT	(H)	(I)	(J)	(K)	(L)
300	Depreciation Expense	N/A	N/A	N/A		N/A
310	Expense less Depreciation	N/A	N/A	N/A		N/A
320	Taxes less F.I.T.	N/A	N/A	N/A		N/A
330	Net Return	N/A	N/A	N/A		N/A
340	F.I.T.	N/A	N/A	N/A		N/A
350	Uncollectible Rev. & Other Adj.	N/A	N/A	N/A		N/A
360	Revenue Effects					
	RATE BASE					
370	Total Plant in Service	N/A	N/A	N/A		N/A
380	Other Rate Base Items	N/A	N/A	N/A		N/A
390	Depreciation Reserve	N/A	N/A	N/A		N/A
400	Accum. Deferred Inc. Tax	N/A	N/A	N/A		N/A
410	Net Rate Base	N/A	N/A	N/A		N/A

NOTE: (1) Total may not equal sum of changes due to interactive effects.
(2) Display whole numbers.

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EXG – 1
Filing Entity: TEST
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1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Exogenous Cost Changes
SPECIAL ACCESS

		SPF TRANSITION	DEM TRANSITION	LTS / TRS	INSIDE WIRE	RESERVE DEFICIENCY AMORTIZATIONS	EXCESS DEFERRED TAXES	ITC AMORTIZATIONS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)
	REVENUE EFFECT							
500	Depreciation Expense			N/A				
510	Expense less Depreciation			N/A				
520	Taxes less F.I.T.			N/A				
530	Net Return			N/A				
540	F.I.T.			N/A				
550	Uncollectible Rev. & Other Adj.	---	---	N/A ---	---	---	---	---
560	Revenue Effects			N/A				
	RATE BASE							
570	Total Plant in Service			N/A				
580	Other Rate Base Items			N/A				
590	Depreciation Reserve			N/A				
600	Accum. Deferred Inc. Tax			N/A				
610	Net Rate Base			N/A				

NOTE: (1) Total may not equal sum of changes due to interactive effects.
(2) Display whole numbers.

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EXG – 1
Filing Entity: TEST
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1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Exogenous Cost Changes
SPECIAL ACCESS

		REMOVAL OF SHARING / LOW END ADJUSTMENT	REVISION TO SHARING / LOW END ADJUSTMENT	SHARING / LOW END ADJUSTMENT	OTHER	TOTAL
		(H)	(I)	(J)	(K)	(L)
	REVENUE EFFECT					
500	Depreciation Expense	N/A	N/A	N/A		N/A
510	Expense less Depreciation	N/A	N/A	N/A		N/A
520	Taxes less F.I.T.	N/A	N/A	N/A		N/A
530	Net Return	N/A	N/A	N/A		N/A
540	F.I.T.	N/A	N/A	N/A		N/A
550	Uncollectible Rev. & Other Adj.	N/A	N/A	N/A		N/A
560	Revenue Effects					
	RATE BASE					
570	Total Plant in Service	N/A	N/A	N/A		N/A
580	Other Rate Base Items	N/A	N/A	N/A		N/A
590	Depreciation Reserve	N/A	N/A	N/A		N/A
600	Accum. Deferred Inc. Tax	N/A	N/A	N/A		N/A
610	Net Rate Base	N/A	N/A	N/A		N/A

NOTE: (1) Total may not equal sum of changes due to interactive effects.
(2) Display whole numbers.

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EXG – 1
Filing Entity: TEST
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1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Exogenous Cost Changes
INTEREXCHANGE

		SPF TRANSITION	DEM TRANSITION	LTS / TRS	INSIDE WIRE	RESERVE DEFICIENCY AMORTIZATIONS	EXCESS DEFERRED TAXES	ITC AMORTIZATIONS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)
	REVENUE EFFECT							
700	Depreciation Expense			N/A				
710	Expense less Depreciation			N/A				
720	Taxes less F.I.T.			N/A				
730	Net Return			N/A				
740	F.I.T.			N/A				
750	Uncollectible Rev. & Other Adj.	---	---	N/A ---	---	---	---	---
760	Revenue Effects			N/A				
	RATE BASE							
770	Total Plant in Service			N/A				
780	Other Rate Base Items			N/A				
790	Depreciation Reserve			N/A				
800	Accum. Deferred Inc. Tax			N/A				
810	Net Rate Base			N/A				

NOTE: (1) Total may not equal sum of changes due to interactive effects.
(2) Display whole numbers.

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EX03 – 1
Filing Entity: TEST
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1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Exogenous Cost Changes
INTEREXCHANGE

		REMOVAL OF SHARING / LOW END ADJUSTMENT	REVISION TO SHARING / LOW END ADJUSTMENT	SHARING / LOW END ADJUSTMENT	OTHER	TOTAL
		(H)	(I)	(J)	(K)	(L)
	REVENUE EFFECT					
700	Depreciation Expense	N/A	N/A	N/A		N/A
710	Expense less Depreciation	N/A	N/A	N/A		N/A
720	Taxes less F.I.T.	N/A	N/A	N/A		N/A
730	Net Return	N/A	N/A	N/A		N/A
740	F.I.T.	N/A	N/A	N/A		N/A
750	Uncollectible Rev. & Other Adj.	N/A	N/A	N/A		N/A
760	Revenue Effects	---	---	---	---	---
	RATE BASE					
770	Total Plant in Service	N/A	N/A	N/A		N/A
780	Other Rate Base Items	N/A	N/A	N/A		N/A
790	Depreciation Reserve	N/A	N/A	N/A		N/A
800	Accum. Deferred Inc. Tax	N/A	N/A	N/A		N/A
810	Net Rate Base	N/A	N/A	N/A		N/A

NOTE: (1) Total may not equal sum of changes due to interactive effects.
(2) Display whole numbers.

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RTE–1
Filing Entity: TEST
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1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Common Line Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	End User Common Line								
100	Multiline Business EUCL (1)								N/A
110	Res & Single line Bus EUCL (1)								N/A
120	Lifeline								N/A
130	Special Access Surcharge								N/A
	Carrier Common Line								
140	Terminating CCL Prem.								N/A
150	Terminating CCL Non–Prem.								N/A
160	Originating CCL Prem.								N/A
170	Originating CCL Non–Prem.								N/A
180	Other Common Line (1)								N/A
190	Total Basket	N/A	N/A	N/A	N/A				N/A

NOTE: (1) May be composite rate.
(2) Display indexes as percents to four decimal places (e.g., display 100% as 100.0000).
(3) Display revenues and demands as whole numbers.

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1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Traffic Sensitive Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	Local Switching Service Category								
200	Premium Switching LS1 FG								N/A
210	Premium Switching LS2 FG								N/A
220	Non–Premium Switching FG								N/A
230	Premium Switching LS1 BSA								N/A
240	Premium Switching LS2 BSA								N/A
250	Non–Premium Switching BSA								N/A
260	Premium Switching LS1 FG – Recast								N/A
270	Premium Switching LS2 FG – Recast								N/A
280	Non–Premium Switching FG – Recast								N/A
290	Equal Access								N/A
300	Other ONA	N/A	N/A	N/A	N/A				N/A
310	Other ONA – Recast FG	N/A	N/A	N/A	N/A				N/A
320	Other Switching	N/A	N/A	N/A	N/A				N/A
330	Total Service Category	N/A	N/A	N/A	N/A				N/A
340	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
350	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
360	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
	Interconnection Charge Service Category								
371	Interconnection Charge – Premium								N/A
372	Interconnection Charge – Non–Premium								N/A
376	Other	N/A	N/A	N/A	N/A				N/A
381	Total Service Category	N/A	N/A	N/A	N/A				N/A
386	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
391	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
396	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

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1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Traffic Sensitive Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	Tandem Switched Transport Service Category								
401	Tandem Switched Transmission	N/A	N/A	N/A	N/A				N/A
406	Tandem Switching	N/A	N/A	N/A	N/A				N/A
411	Installation Charges	N/A	N/A	N/A	N/A				N/A
412	Other	N/A	N/A	N/A	N/A				N/A
416	Total TndmSwTprt Service Cat	N/A	N/A	N/A	N/A				N/A
417	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
418	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
419	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Traffic Sensitive Basket

	BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
	(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
Tandem Switched Transport Service Category (contd)								
[Held for Future Use]								

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Traffic Sensitive Basket

	Direct Trunked Transport Service Category	BASE PERIOD DEMAND (A)	RATES AT LAST PCI UPDATE (B)	CURRENT RATES (C)	PROPOSED RATES (D)	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE (E)	BASE PERIOD DEMAND x CURRENT RATES (F)	BASE PERIOD DEMAND x PROPOSED RATES (G)	INDEX RESULTS (H)
501	Interoffice Direct Trunked Transport – VG	N/A	N/A	N/A	N/A				N/A
502	Interoffice Direct Trunked Transport – DS1	N/A	N/A	N/A	N/A				N/A
503	Interoffice Direct Trunked Transport – DS3	N/A	N/A	N/A	N/A				N/A
506	Entrance Facilities – VG	N/A	N/A	N/A	N/A				N/A
507	Entrance Facilities – DS1	N/A	N/A	N/A	N/A				N/A
508	Entrance Facilities – DS3	N/A	N/A	N/A	N/A				N/A
511	Installation Charges	N/A	N/A	N/A	N/A				N/A
512	Other	N/A	N/A	N/A	N/A				N/A
516	Total DirTrkTprt Service Cat	N/A	N/A	N/A	N/A				N/A
517	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
518	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
519	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Traffic Sensitive Basket

	BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
	(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
Direct Trunked Transport Service Category (cont'd)								
[Held for Future Use]								

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Traffic Sensitive Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	Information Service Category								
700	Information -- Per MSG.								N/A
710	Info--Premium Surcharge								N/A
720	Info--Non--Premium Surcharge								N/A
730	Information--Other	N/A	N/A	N/A	N/A				N/A
740	Total Service Category	N/A	N/A	N/A	N/A				N/A
750	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
760	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
770	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
	Database Access Category								
	800 DB VERTICAL SERVICES SUB--CAT								
776	Vertical Features	N/A	N/A	N/A	N/A				N/A
777	Vertical Services SubIndex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
778	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
779	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
780	Basic 800								N/A
790	Other 800 Service	N/A	N/A	N/A	N/A				N/A
800	Total Service Category	N/A	N/A	N/A	N/A				N/A
810	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
820	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
830	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
840	Total Basket	N/A	N/A	N/A	N/A				N/A
850	Total API	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
860	Total PCI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Special Access Basket

	Voice Grade, Wats, Metallic, & Telegraph Service Category	BASE PERIOD DEMAND (A)	RATES AT LAST PCI UPDATE (B)	CURRENT RATES (C)	PROPOSED RATES (D)	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE (E)	BASE PERIOD DEMAND x CURRENT RATES (F)	BASE PERIOD DEMAND x PROPOSED RATES (G)	INDEX RESULTS (H)
	VOICE GRADE & WATS:								
900	Chan Term – 2 Wire								N/A
910	Chan Term – 4 Wire								N/A
	Inter–Office Mileage:								
920	Voice Grade – MB1 FIXED								N/A
930	Voice Grade – MB1 VAR								N/A
940	Voice Grade – MB2 FIXED								N/A
950	Voice Grade – MB2 VAR								N/A
960	Voice Grade – MB3 FIXED								N/A
970	Voice Grade – MB3 VAR								N/A
980	Voice Grade – MB4 FIXED								N/A
990	Voice Grade – MB4 VAR								N/A
1000	Voice Grade – MB5 FIXED								N/A
1010	Voice Grade – MB5 VAR								N/A
1020	Voice Grade – MB6 FIXED								N/A
1030	Voice Grade – MB6 VAR								N/A
1040	Voice Grade – MB7 FIXED								N/A
1050	Voice Grade – MB7 VAR								N/A
1060	Voice Grade – MB8 FIXED								N/A
1070	Voice Grade – MB8 VAR								N/A
1080	Voice Grade – MB9 FIXED								N/A
1090	Voice Grade – MB9 VAR								N/A
1100	Voice Grade – MB10 FIXED								N/A
1110	Voice Grade – MB10 VAR								N/A
1120	Other Voice Grade Fixed	N/A	N/A	N/A	N/A				N/A

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Special Access Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	METALLIC:								
1200	Channel Term								N/A
1210	Inter–Office Mileage Fixed		N/A	N/A	N/A				N/A
1220	Inter–Office Mileage Variable		N/A	N/A	N/A				N/A
1230	Other	N/A	N/A	N/A	N/A				N/A
	TELEGRAPH:								
1240	Chan. Term–2 Wire								N/A
1250	Chan. Term–4 Wire								N/A
1260	Inter–Office Mileage Fixed		N/A	N/A	N/A				N/A
1270	Inter–Office Mileage Variable		N/A	N/A	N/A				N/A
1280	Other	N/A	N/A	N/A	N/A				N/A
1290	OTHER:	N/A	N/A	N/A	N/A				N/A
1300	Total Service Category	N/A	N/A	N/A	N/A				N/A
1310	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
1320	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
1330	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Special Access Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	Audio & Video Service Category								
	AUDIO:								
1500	Channel Term		N/A	N/A	N/A				N/A
1510	Inter–Office Mileage		N/A	N/A	N/A				N/A
1520	Other	N/A	N/A	N/A	N/A				N/A
	VIDEO:								
1530	Channel Term		N/A	N/A	N/A				N/A
1540	Inter–Office Mileage		N/A	N/A	N/A				N/A
1550	Other	N/A	N/A	N/A	N/A				N/A
1560	Total Service Category	N/A	N/A	N/A	N/A				N/A
1570	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
1580	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
1590	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

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1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Special Access Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	High Cap & DDS Service Category								
	DS1 SUB–CAT:								N/A
1700	Chan Term								
	Inter–Office Mileage:								N/A
1710	DS1 – MB1								N/A
1720	DS1 – MB2								N/A
1730	DS1 – MB3								N/A
1740	DS1 – MB4								N/A
1750	DS1 – MB5								N/A
1760	DS1 – MB6								N/A
1770	DS1 – MB7								N/A
1780	DS1 – MB8								N/A
1790	DS1 – MB9								N/A
1800	DS1 – MB10								N/A
1810	Other	N/A	N/A	N/A	N/A				
1820	Total Sub–Category	N/A	N/A	N/A	N/A				N/A
1830	DS1 Subindex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
1840	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
1850	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

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1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Special Access Basket

	High Cap & DDS Service Category	BASE PERIOD DEMAND (A)	RATES AT LAST PCI UPDATE (B)	CURRENT RATES (C)	PROPOSED RATES (D)	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE (E)	BASE PERIOD DEMAND x CURRENT RATES (F)	BASE PERIOD DEMAND x PROPOSED RATES (G)	INDEX RESULTS (H)
	DS1, DENSITY ZONE 1:								
2000	Chan Term								N/A
	Inter–Office Mileage:								
2010	DS1 – MB1								N/A
2020	DS1 – MB2								N/A
2030	DS1 – MB3								N/A
2040	DS1 – MB4								N/A
2050	DS1 – MB5								N/A
2060	DS1 – MB6								N/A
2070	DS1 – MB7								N/A
2080	DS1 – MB8								N/A
2090	DS1 – MB9								N/A
2100	DS1 – MB10								N/A
2110	Other	N/A	N/A	N/A	N/A				N/A
2120	Total Sub–Category	N/A	N/A	N/A	N/A				N/A
2130	Subindex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
2140	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
2150	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Special Access Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	High Cap & DDS Service Category								
	DS1, DENSITY ZONE 2:								
2300	Chan Term								N/A
	Inter–Office Mileage:								
2310	DS1 – MB1								N/A
2320	DS1 – MB2								N/A
2330	DS1 – MB3								N/A
2340	DS1 – MB4								N/A
2350	DS1 – MB5								N/A
2360	DS1 – MB6								N/A
2370	DS1 – MB7								N/A
2380	DS1 – MB8								N/A
2390	DS1 – MB9								N/A
2400	DS1 – MB10								N/A
2410	Other	N/A	N/A	N/A	N/A				N/A
2420	Total Sub–Category	N/A	N/A	N/A	N/A				N/A
2430	Subindex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
2440	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
2450	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Special Access Basket

	High Cap & DDS Service Category	BASE PERIOD DEMAND (A)	RATES AT LAST PCI UPDATE (B)	CURRENT RATES (C)	PROPOSED RATES (D)	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE (E)	BASE PERIOD DEMAND x CURRENT RATES (F)	BASE PERIOD DEMAND x PROPOSED RATES (G)	INDEX RESULTS (H)
	DS1, DENSITY ZONE 3:								
2600	Chan Term								N/A
	Inter–Office Mileage:								
2610	DS1 – MB1								N/A
2620	DS1 – MB2								N/A
2630	DS1 – MB3								N/A
2640	DS1 – MB4								N/A
2650	DS1 – MB5								N/A
2660	DS1 – MB6								N/A
2670	DS1 – MB7								N/A
2680	DS1 – MB8								N/A
2690	DS1 – MB9								N/A
2700	DS1 – MB10								N/A
2710	Other	N/A	N/A	N/A	N/A				N/A
2720	Total Sub–Category	N/A	N/A	N/A	N/A				N/A
2730	Subindex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
2740	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
2750	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Special Access Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	High Cap & DDS Service Category (Cont.)								
	DS3 SUB-CAT:								
2900	Channel Term								N/A
	Inter-Office Mileage:								
2910	DS3 - MB1								N/A
2920	DS3 - MB2								N/A
2930	DS3 - MB3								N/A
2940	DS3 - MB4								N/A
2950	DS3 - MB5								N/A
2960	DS3 - MB6								N/A
2970	DS3 - MB7								N/A
2980	DS3 - MB8								N/A
2990	DS3 - MB9								N/A
3000	DS3 - MB10								N/A
3010	Other	N/A	N/A	N/A	N/A				N/A
3020	Total Sub-Category	N/A	N/A	N/A	N/A				N/A
3030	DS3 Subindex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
3040	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
3050	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Special Access Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	High Cap & DDS Service Category								
	DS3, DENSITY ZONE 1:								
3200	Chan Term								N/A
	Inter–Office Mileage:								
3210	DS3 – MB1								N/A
3220	DS3 – MB2								N/A
3230	DS3 – MB3								N/A
3240	DS3 – MB4								N/A
3250	DS3 – MB5								N/A
3260	DS3 – MB6								N/A
3270	DS3 – MB7								N/A
3280	DS3 – MB8								N/A
3290	DS3 – MB9								N/A
3300	DS3 – MB10								N/A
3310	Other	N/A	N/A	N/A	N/A				N/A
3320	Total Sub–Category	N/A	N/A	N/A	N/A				N/A
3330	Subindex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
3340	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
3350	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

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1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Special Access Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	High Cap & DDS Service Category								
	DS3, DENSITY ZONE 2:								
3500	Chan Term								N/A
	Inter–Office Mileage:								
3510	DS3 – MB1								N/A
3520	DS3 – MB2								N/A
3530	DS3 – MB3								N/A
3540	DS3 – MB4								N/A
3550	DS3 – MB5								N/A
3560	DS3 – MB6								N/A
3570	DS3 – MB7								N/A
3580	DS3 – MB8								N/A
3590	DS3 – MB9								N/A
3600	DS3 – MB10								N/A
3610	Other	N/A	N/A	N/A	N/A				N/A
3620	Total Sub–Category	N/A	N/A	N/A	N/A				N/A
3630	Subindex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
3640	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
3650	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Special Access Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	High Cap & DDS Service Category								
	DS3, DENSITY ZONE 3:								
3800	Chan Term								N/A
	Inter–Office Mileage:								
3810	DS3 – MB1								N/A
3820	DS3 – MB2								N/A
3830	DS3 – MB3								N/A
3840	DS3 – MB4								N/A
3850	DS3 – MB5								N/A
3860	DS3 – MB6								N/A
3870	DS3 – MB7								N/A
3880	DS3 – MB8								N/A
3890	DS3 – MB9								N/A
3900	DS3 – MB10								N/A
3910	Other	N/A	N/A	N/A	N/A				N/A
3920	Total Sub–Category	N/A	N/A	N/A	N/A				N/A
3930	Subindex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
3940	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
3950	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Special Access Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	High Cap & DDS Service Category								
	DDS:								
4100	Channel Term		N/A	N/A	N/A				N/A
4110	Inter--Office Mileage		N/A	N/A	N/A				N/A
4120	Other	N/A	N/A	N/A	N/A				N/A
4130	OTHER HIGH--CAP & DDS	N/A	N/A	N/A	N/A				N/A
4140	Total Service Category	N/A	N/A	N/A	N/A				N/A
4150	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
4160	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
4170	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Special Access Basket

	Wideband Service Category	BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	DATA:								
4300	Channel Term		N/A	N/A	N/A				N/A
4310	Inter–Office Mileage		N/A	N/A	N/A				N/A
4320	Other	N/A	N/A	N/A	N/A				N/A
	ANALOG:								
4330	Channel Term		N/A	N/A	N/A				N/A
4340	Inter–Office Mileage		N/A	N/A	N/A				N/A
4350	Other	N/A	N/A	N/A	N/A				N/A
4360	Other Wideband	N/A	N/A	N/A	N/A				N/A
4370	Total Service Category	N/A	N/A	N/A	N/A				N/A
4380	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
4390	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
4400	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
4410	Total Basket	N/A	N/A	N/A	N/A				N/A
4420	Total API	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
4430	Total PCI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

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1993 Initial Transport Restructure Filing
Price Cap Tariff Review Plan
Interexchange Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	Interexchange								
4600	Total Basket	N/A	N/A	N/A	N/A				N/A
4610	Total API	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
4620	Total PCI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

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ANALYZER
Filing Entity: TEST
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1993 Initial Transport Restructure Filing

	LEC	FCC	Delta	Flag
GENERAL				
GNPPI	0.00000			
X for CL, TS and SP	0.00000			
X for IX	0.0000			
EXOGENOUS CHANGES in thousands				
SPF	$0			
DEM	$0			
LTS/TRS	$0			
ISW	$0			
RDA	$0			
EDT	$0			
ITC	$0			
REMOVAL SHARING/LOW END ADJ	$0			
REVISION SHARING/LOW END ADJ	$0			
SHARING/LOW END ADJ	$0			
OTHER	$0			
TOTAL OF INDIVIDUALS	$0			
TOTAL EXOGENOUS	$0			
COMMON LINE				
Term Prem CCL Rate	0.00000	NONE	0.00000	*
Orig Prem CCL Rate	0.00000	NONE	0.00000	*
g	0.00000			
Proposed PCI	0.0000	NONE	0.0000	*

1993 Initial Transport Restructure Filing

	LEC	FCC	Delta	Flag
TRAFFIC SENSITIVE----------				
Local Switching				
Proposed SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Interconnection Charge				
Proposed SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Tandem Switched transport				
Proposed SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Direct Trunked Transport				
Proposed SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Information				
Proposed SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Database Access				
800DB Vertical Features Sub-Index				
Prop Sub-Index	0	NONE	0.000	*
Sub-Index Upper Limit	0	NONE	0.000	*
Sub-Index Lower Limit	0	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
Total Database Access				
Proposed SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Total Traffic Sensitive				
TS API	0.0000	NONE	0.000	*
TS PCI	0.0000	NONE	0.000	*
LEC API Above PCI?				*

1993 Initial Transport Restructure Filing

	LEC	FCC	Delta	Flag
TRAFFIC SENSITIVE				

[Held for Future Use]

1993 Initial Transport Restructure Filing

	LEC	FCC	Delta	Flag
SPECIAL				
VG, MT, TG				
Proposed SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Audio & Video				
Proposed SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
HICap				
DS1				
Prop Sub-Index	0.0000	NONE	0.000	*
Sub-Index Up Lim	0.0000	NONE	0.000	*
Sub-Index Low Lim	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3				
Prop Sub-Index	0.0000	NONE	0.000	*
Sub-Index Up Lim	0.0000	NONE	0.000	*
Sub-Index Low Lim	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
Total HICap				
Proposed SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out?				*
FCC SBI Out?				*
Wideband				
Proposed SBI	0.0000	NONE	0.000	*
SBI: Upper Limit	0.0000	NONE	0.000	*
SBI: Lower Limit	0.0000	NONE	0.000	*
LEC SBI Out Bounds?				*
FCC SBI Out Bounds?				*
Total Special Access				
Special API	0.0000	NONE	0.000	*
Special PCI	0.0000	NONE	0.000	*
LEC API Above PCI?				*
FCC API Above PCI?				*

INTEREXCHANGE

1993 Initial Transport Restructure Filing

	LEC	FCC	Delta	Flag
SPECIAL				
DS1 ZONE DENSITY PLAN 1				
Prop Sub-Index	0.0000	NONE	0.000	*
Sub-Index Up Lim	0.0000	NONE	0.000	*
Sub-Index Low Lim	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 ZONE DENSITY PLAN 2				
Prop Sub-Index	0.0000	NONE	0.000	*
Sub-Index Up Lim	0.0000	NONE	0.000	*
Sub-Index Low Lim	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS1 ZONE DENSITY PLAN 3				
Prop Sub-Index	0.0000	NONE	0.000	*
Sub-Index Up Lim	0.0000	NONE	0.000	*
Sub-Index Low Lim	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 ZONE DENSITY PLAN 1				
Prop Sub-Index	0.0000	NONE	0.000	*
Sub-Index Up Lim	0.0000	NONE	0.000	*
Sub-Index Low Lim	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 ZONE DENSITY PLAN 2				
Prop Sub-Index	0.0000	NONE	0.000	*
Sub-Index Up Lim	0.0000	NONE	0.000	*
Sub-Index Low Lim	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*
DS3 ZONE DENSITY PLAN 3				
Prop Sub-Index	0.0000	NONE	0.000	*
Sub-Index Up Lim	0.0000	NONE	0.000	*
Sub-Index Low Lim	0.0000	NONE	0.000	*
LEC Sub-Ind Out?				*
FCC Sub-Ind Out?				*

Supplemental
Tariff Review Plan
for Price Cap Companies

Approved by OMB
3060-0575
Expires 11/30/93
See below for information regarding public
burden estimate

NOTICE: The Tariff Review Plan (TRP) contains requirements for summary cost support material that certain local exchange carriers (LECs) must file to support their local tranpsort charge tariff filings in partial fulfillment of Sections 61.38 and 61.44 through 61.49 of the Commission's Rules. The TRPs specify basic cost, rate, and demand information in a consistent format and are essential components of the Commission's access tariff review process. The information in the TRP is used by the FCC to evaluate rates. Your response is mandatory. Public reporting burden for this collection of information is estimated to average 12 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Office of Managing Director, Washington, DC 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC, 20503.

COSA: TEST

Supplemental TRP for Transport

69.110 Entrance Facilities: Based on Special Access Channel Termination Rates:

		Rates as of 9/1/92			Adjusted for 7/1/93 PCI		
	Mileage	per Month	per Mile	Nonre-curring	per Month	per Mile	Nonre-curring
Voice Grade							
Premium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Other :							
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
NonPremium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Other :							
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	

COSA: TEST

Supplemental TRP for Transport

69.110 Entrance Facilities: Based on Special Access Channel Termination Rates:

		Rates as of 9/1/92			Adjusted for 7/1/93 PCI		
	Mileage	per Month	per Mile	Nonre-curring	per Month	per Mile	Nonre-curring
DS1							
Premium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Multiplexing:							
DS1 to DS0	N/A		N/A			N/A	
DS1 to VG	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
Other :							
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
NonPremium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Multiplexing:							
DS1 to DS0	N/A		N/A			N/A	
DS1 to VG	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
Other :							
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	

COSA: TEST

Supplemental TRP for Transport

69.110 Entrance Facilities: Based on Special Access Channel Termination Rates:

		Rates as of 9/1/92			Adjusted for 7/1/93 PCI		
	Mileage	per Month	per Mile	Nonre-curring	per Month	per Mile	Nonre-curring
DS3							
Premium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Multiplexing:							
DS3 to DS1	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
Other :							
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
NonPremium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Multiplexing:							
DS3 to DS1	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
Other :							
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	

COSA: TEST

Supplemental TRP for Transport

69.112 Direct–Trunked Transport: Based on Special Access Interoffice Transmission Charges:

		Rates as of 9/1/92			Adjusted for 7/1/93 PCI		
	Mileage	per Month	per Mile	Nonre–curring	per Month	per Mile	Nonre–curring
Voice Grade							
Premium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Other :							
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
NonPremium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Other :							
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	

COSA: TEST

Supplemental TRP for Transport

69.112 Direct–Trunked Transport: Based on Special Access Interoffice Transmission Charges:

		Rates as of 9/1/92			Adjusted for 7/1/93 PCI		
	Mileage	per Month	per Mile	Nonre–curring	per Month	per Mile	Nonre–curring
DS1							
Premium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Multiplexing:							
DS1 to DS0	N/A		N/A			N/A	
DS1 to VG	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
Other :							
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
NonPremium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Multiplexing:							
DS1 to DS0	N/A		N/A			N/A	
DS1 to VG	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
Other :							
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	

COSA: TEST

Supplemental TRP for Transport

69.112 Direct-Trunked Transport: Based on Special Access Interoffice Transmission Charges:

		Rates as of 9/1/92			Adjusted for 7/1/93 PCI		
	Mileage	per Month	per Mile	Nonre-curring	per Month	per Mile	Nonre-curring
DS3							
Premium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Multiplexing:							
DS3 to DS1	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
Other :							
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
NonPremium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Multiplexing:							
DS3 to DS1	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
Other :							
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	

COSA: TEST

Supplemental TRP for Transport

69.108 Transport Rate Benchmark (Special Access rates as of 9/1/92, adjusted for 1993 PCI):

(a) One Mile DS3 Channel Termination Charge:
(b) Ten Mile DS3 Interoffice Transmission Charge:
(c) One DS3 Multiplexer Special Access Rate:
(d) Sum of (a), (b), and (c):
(e) One Mile DS1 Channel Termination Charge:
(f) Ten Mile DS1 Interoffice Transmission Charge:
(g) Sum of (e) and (f):
(h) Ratio of (d) to (g):

Note: If (h) is less than 9.6, companies should demonstrate in their cost support that their proposed transport rates meet or exceed this ratio.

COSA: TEST

Supplemental TRP for Transport

69.111 Tandem-Switched Transport: Based on Direct-Trunked Transport Rates:

Relative Weight for DS1
Relative Weight for DS3

	Mileage	Rate per VG Minute per Month	Rate per VG Minute per Mile	% Occurrence: DS1 to DS0 Mux	Weight*Rate per VG Min per Month	Weight*Rate per VG Min per Mile
DS1						
Fixed Charge A	0		N/A	N/A		N/A
Fixed Charge B	0		N/A	N/A		N/A
Mileage Band A				N/A		
Mileage Band B				N/A		
Mileage Band C				N/A		
Mileage Band D				N/A		
Mileage Band E				N/A		
Mileage Band F				N/A		
DS1 to DS0 Multiplexing						
DS3						
Fixed Charge A	0		N/A	N/A		N/A
Fixed Charge B	0		N/A	N/A		N/A
Mileage Band A				N/A		
Mileage Band B				N/A		
Mileage Band C				N/A		
Mileage Band D				N/A		
Mileage Band E				N/A		
Mileage Band F				N/A		
DS3 to DS1 Multiplexing				N/A		
TST						
Premium:						
Fixed Charge A	0		N/A	N/A	N/A	N/A
Fixed Charge B	0		N/A	N/A	N/A	N/A
Mileage Band A				N/A	N/A	N/A
Mileage Band B				N/A	N/A	N/A
Mileage Band C				N/A	N/A	N/A
Mileage Band D				N/A	N/A	N/A
Mileage Band E				N/A	N/A	N/A
Mileage Band F				N/A	N/A	N/A
NonPremium:						
Fixed Charge A	0		N/A	N/A	N/A	N/A
Fixed Charge B	0		N/A	N/A	N/A	N/A
Mileage Band A				N/A	N/A	N/A
Mileage Band B				N/A	N/A	N/A
Mileage Band C				N/A	N/A	N/A
Mileage Band D				N/A	N/A	N/A
Mileage Band E				N/A	N/A	N/A
Mileage Band F				N/A	N/A	N/A

Tandem Switching Charge:
(a) 1992 COE Category 2 interstate tandem net investment assigned to transport:
(b) Authorized 11.25% return on (a):
(c) Income taxes, restated to 11.25% rate of return, related to (a):
(d) Other associated expenses related to (a):
(e) Overhead expenses, allocated to (a):
(f) Total revenue requirement related to (a) = (b) + (c) + (d) + (e)
(g) 20% of (f) [(f) * .2] :
(h) Base year 1992 tandem-switched chargeable transport minutes of use:
(i) Premium Rate [(g)/(h)] :
(j) NonPremium Rate :

Note: Chargeable minutes of use = Premium MOU + .45 * Non-Premium MOU

COSA: TEST

Supplemental TRP for Transport

69.125 Dedicated Signalling Transport:

Effective date of initial tariff offering dedicated signalling transport (if any):
If not currently offered, which special access interoffice charges are equivalent:

		Rates		
	Mileage	per Month	per Mile	Nonre-curring
STP Port Termination Charge	N/A			
Signalling Link:				
Fixed Charge	0			
Mileage Band A				
Mileage Band B				
Mileage Band C				
Mileage Band D				
Mileage Band E				

Other :

—
—
—
—
—
—
—
—
—
—
—
—
—
—

COSA: TEST

Supplemental TRP for Transport

69.124 Interconnection Charge

	Demand	Rate	Revenues
(a) Total Transport Revenues (total)	N/A	N/A	
[Rate Element 1]			
[Rate Element 2]			
etc			

Note: Demand is historical 1992 base period demand.
Rates are rates in effect as of 8/31/93.

COSA: TEST

Supplemental TRP for Transport

69.124 Interconnection Charge (continued)

	Demand	Rate	Revenues
(b) Entrance Facilities (total)	N/A	N/A	
[Rate Element 1]			
[Rate Element 2]			
etc			

Note: Demand is historical 1992 base period demand restated in terms of the new rate structure.
Rates are the rates proposed in this filing.

COSA: TEST

Supplemental TRP for Transport

69.124 Interconnection Charge (continued)

	Demand	Rate	Revenues
(c) Tandem–Switched Transport (total)	N/A	N/A	
[Rate Element 1]			
[Rate Element 2]			
etc			

Note: Demand is historical 1992 base period demand restated in terms of the new rate structure.
Demand for TST transmission includes demand for host–to–remote transport and Feature Group A transport between dial tone office and end offices.
Rates are the rates proposed in this filing.

COSA: TEST

Supplemental TRP for Transport

69.124 Interconnection Charge (continued)

	Demand	Rate	Revenues
(d) Direct Trunked Transport (total)	N/A	N/A	
[Rate Element 1]			
[Rate Element 2]			
etc			

Note: Demand is historical 1992 base period demand restated in terms of the new rate structure.
Rates are the rates proposed in this filing.

COSA: TEST

Supplemental TRP for Transport

69.124 Interconnection Charge (continued)

	Demand	Rate	Revenues
(e) Dedicated Signalling Transport (total)	N/A	N/A	
[Rate Element 1]			
[Rate Element 2]			
etc			

Note: Demand is historical 1992 base period demand restated in terms of the new rate structure.
Rates are the rates proposed in this filing.

COSA: TEST

Supplemental TRP for Transport

69.124 Interconnection Charge (Summary)

	Demand	Rate	Revenues
(a) Total Transport Revenues (total)	N/A	N/A	
(b) Entrance Facilities (total)	N/A	N/A	
(c) Tandem–Switched Transport (total)	N/A	N/A	
(d) Direct Trunked Transport (total)	N/A	N/A	
(e) Dedicated Signalling Transport (total)	N/A	N/A	
(f) Total Facility–based Transport Revenues [(b)+(c)+(d)+(e)]	N/A	N/A	
(g) Interconnection Charge Revenues [(a)–(f)]	N/A	N/A	
(h) Total 1992 chargeable interstate access minutes		N/A	N/A
(i) Premium Interconnection charge [(g)/(h)]	N/A		N/A
(j) Non–Premium Interconnection charge [(i)*.45]	N/A		N/A

Note: Chargeable minutes of use = Premium MOU + .45 * Non–Premium MOU

Supplemental
Tariff Review Plan
for Rate of Return Companies

Approved by OMB
3060-0575
Expires 11/30/93
See below for information regarding public
burden estimate

NOTICE: The Tariff Review Plan (TRP) contains requirements for summary cost support material that certain local exchange carriers (LECs) must file to support their local tranpsort charge tariff filings in partial fulfillment of Sections 61.38 and 61.44 through 61.49 of the Commission's Rules. The TRPs specify basic cost, rate, and demand information in a consistent format and are essential components of the Commission's access tariff review process. The information in the TRP is used by the FCC to evaluate rates. Your response is mandatory. Public reporting burden for this collection of information is estimated to average 12 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Office of Managing Director, Washington, DC 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC, 20503.

COSA: TEST

Supplemental TRP for Transport

69.110 Entrance Facilities: Based on Special Access Channel Termination Rates:

		Rates as of 9/1/92			Adjusted for GSF		
	Mileage	per Month	per Mile	Nonre-curring	per Month	per Mile	Nonre-curring
Voice Grade							
Premium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Other :							
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
NonPremium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Other :							
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	

COSA: TEST

Supplemental TRP for Transport

69.110 Entrance Facilities: Based on Special Access Channel Termination Rates:

		Rates as of 9/1/92			Adjusted for GSF		
	Mileage	per Month	per Mile	Nonre-curring	per Month	per Mile	Nonre-curring
DS1							
Premium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Multiplexing:							
DS1 to DS0	N/A		N/A			N/A	
DS1 to VG	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
Other :							
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
NonPremium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Multiplexing:							
DS1 to DS0	N/A		N/A			N/A	
DS1 to VG	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
Other :							
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	

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Supplemental TRP for Transport

69.110 Entrance Facilities: Based on Special Access Channel Termination Rates:

		Rates as of 9/1/92			Adjusted for GSF		
	Mileage	per Month	per Mile	Nonre-curring	per Month	per Mile	Nonre-curring
DS3							
Premium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Multiplexing:							
DS3 to DS1	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
Other :							
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
NonPremium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Multiplexing:							
DS3 to DS1	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
Other :							
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	

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Supplemental TRP for Transport

69.112 Direct–Trunked Transport: Based on Special Access Interoffice Transmission Charges:

		Rates as of 9/1/92			Adjusted for GSF		
	Mileage	per Month	per Mile	Nonre–curring	per Month	per Mile	Nonre–curring
Voice Grade							
Premium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Other :							
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
NonPremium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Other :							
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	
—	N/A		N/A			N/A	

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Supplemental TRP for Transport

69.112 Direct–Trunked Transport: Based on Special Access Interoffice Transmission Charges:

		Rates as of 9/1/92			Adjusted for GSF		
	Mileage	per Month	per Mile	Nonre–curring	per Month	per Mile	Nonre–curring
DS1							
Premium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Multiplexing:							
DS1 to DS0	N/A		N/A			N/A	
DS1 to VG	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
Other :							
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
NonPremium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Multiplexing:							
DS1 to DS0	N/A		N/A			N/A	
DS1 to VG	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
Other :							
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	

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Supplemental TRP for Transport

69.112 Direct-Trunked Transport: Based on Special Access Interoffice Transmission Charges:

		Rates as of 9/1/92			Adjusted for GSF		
	Mileage	per Month	per Mile	Nonre-curring	per Month	per Mile	Nonre-curring
DS3							
Premium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Multiplexing:							
DS3 to DS1	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
Other :							
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
NonPremium:							
Fixed Charge A	0		N/A			N/A	
Fixed Charge B	0		N/A			N/A	
Mileage Band A							
Mileage Band B							
Mileage Band C							
Mileage Band D							
Mileage Band E							
Mileage Band F							
Multiplexing:							
DS3 to DS1	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
Other :							
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	
___	N/A		N/A			N/A	

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Supplemental TRP for Transport

69.108 Transport Rate Benchmark (Special Access rates as of 9/1/92, adjusted for GSF):

(a) One Mile DS3 Channel Termination Charge:
(b) Ten Mile DS3 Interoffice Transmission Charge:
(c) One DS3 Multiplexer Special Access Rate:
(d) Sum of (a), (b), and (c):
(e) One Mile DS1 Channel Termination Charge:
(f) Ten Mile DS1 Interoffice Transmission Charge:
(g) Sum of (e) and (f):
(h) Ratio of (d) to (g):

Note: If (h) is less than 9.6, companies should demonstrate in their cost support that their proposed transport rates meet or exceed this ratio.

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Supplemental TRP for Transport

69.111 Tandem-Switched Transport: Based on Direct-Trunked Transport Rates:

Relative Weight for DS1
Relative Weight for DS3

	Mileage	Rate per VG Minute per Month	Rate per VG Minute per Mile	% Occurrence: DS1 to DS0 Mux	Weight*Rate per VG Min per Month	Weight*Rate per VG Min per Mile
DS1						
Fixed Charge A	0		N/A	N/A		N/A
Fixed Charge B	0		N/A	N/A		N/A
Mileage Band A				N/A		
Mileage Band B				N/A		
Mileage Band C				N/A		
Mileage Band D				N/A		
Mileage Band E				N/A		
Mileage Band F				N/A		
DS1 to DS0 Multiplexing						
DS3						
Fixed Charge A	0		N/A	N/A		N/A
Fixed Charge B	0		N/A	N/A		N/A
Mileage Band A				N/A		
Mileage Band B				N/A		
Mileage Band C				N/A		
Mileage Band D				N/A		
Mileage Band E				N/A		
Mileage Band F				N/A		
DS3 to DS1 Multiplexing				N/A		
TST						
Premium:						
Fixed Charge A	0		N/A	N/A	N/A	N/A
Fixed Charge B	0		N/A	N/A	N/A	N/A
Mileage Band A				N/A	N/A	N/A
Mileage Band B				N/A	N/A	N/A
Mileage Band C				N/A	N/A	N/A
Mileage Band D				N/A	N/A	N/A
Mileage Band E				N/A	N/A	N/A
Mileage Band F				N/A	N/A	N/A
NonPremium:						
Fixed Charge A	0		N/A	N/A	N/A	N/A
Fixed Charge B	0		N/A	N/A	N/A	N/A
Mileage Band A				N/A	N/A	N/A
Mileage Band B				N/A	N/A	N/A
Mileage Band C				N/A	N/A	N/A
Mileage Band D				N/A	N/A	N/A
Mileage Band E				N/A	N/A	N/A
Mileage Band F				N/A	N/A	N/A

Tandem Switching Charge:
(a) COE Category 2 interstate tandem net investment assigned to transport:
(b) Authorized 11.25% return on (a):
(c) Income taxes, restated to 11.25% rate of return, related to (a):
(d) Other associated expenses related to (a):
(e) Overhead expenses, allocated to (a):
(f) Total revenue requirement related to (a) = (b) + (c) + (d) + (e)
(g) 20% of (f) [(f) * .2] :
(h) Tandem-switched chargeable transport minutes of use:
(i) Premium Rate [(g)/(h)] :
(i) NonPremium Rate :

Note: Chargeable minutes of use = Premium MOU + .45 * Non-Premium MOU

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Supplemental TRP for Transport

69.125 Dedicated Signalling Transport:

Effective date of initial tariff offering dedicated signalling transport (if any):
If not currently offered, which special access interoffice charges are equivalent:

		Rates		
	Mileage	per Month	per Mile	Nonre-curring
STP Port Termination Charge	N/A			
Signalling Link:				
Fixed Charge	0			
Mileage Band A				
Mileage Band B				
Mileage Band C				
Mileage Band D				
Mileage Band E				

Other :

—
—
—
—
—
—
—
—
—
—
—
—
—
—

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Supplemental TRP for Transport

69.124 Interconnection Charge

	Revenue Requirement
(a) Part 69 Transport Revenue Requirement	

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Supplemental TRP for Transport

69.124 Interconnection Charge (continued)

	Demand	Rate	Revenues
(b) Entrance Facilities (total)	N/A	N/A	
[Rate Element 1]			
[Rate Element 2]			
etc			

Note: Rates are the rates proposed in this filing.

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Supplemental TRP for Transport

69.124 Interconnection Charge (continued)

	Demand	Rate	Revenues
(c) Tandem–Switched Transport (total)	N/A	N/A	
[Rate Element 1]			
[Rate Element 2]			
etc			

Note: Demand for TST transmission includes demand for host–to–remote transport and Feature Group A transport between dial tone office and end offices. Rates are the rates proposed in this filing.

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Supplemental TRP for Transport

69.124 Interconnection Charge (continued)

	Demand	Rate	Revenues
(d) Direct Trunked Transport (total)	N/A	N/A	
[Rate Element 1]			
[Rate Element 2]			
etc			

Note: Rates are the rates proposed in this filing.

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Supplemental TRP for Transport

69.124 Interconnection Charge (continued)

	Demand	Rate	Revenues
(e) Dedicated Signalling Transport (total)	N/A	N/A	
[Rate Element 1]			
[Rate Element 2]			
etc			

Note: Rates are the rates proposed in this filing.

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Supplemental TRP for Transport

69.124 Interconnection Charge (Summary)

	Demand	Rate	Revenues
(a) Total Part 69 Transport Revenue Requirement	N/A	N/A	
(b) Entrance Facilities (total)	N/A	N/A	
(c) Tandem–Switched Transport (total)	N/A	N/A	
(d) Direct Trunked Transport (total)	N/A	N/A	
(e) Dedicated Signalling Transport (total)	N/A	N/A	
(f) Total Facility–based Transport Revenues [(b)+(c)+(d)+(e)]	N/A	N/A	
(g) Interconnection Charge Revenues [(a)–(f)]	N/A	N/A	
(h) Total chargeable interstate access minutes		N/A	N/A
(i) Premium interconnection charge [(g)/(h)]	N/A		N/A
(j) Non–Premium interconnection charge [(i)*.45]	N/A		N/A

Note: Chargeable minutes of use = Premium MOU + .45 * Non–Premium MOU

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FCC 93-350

In the Matter of	)	
	)	
Redevelopment of Spectrum to	)	ET Docket No. 92-9
Encourage Innovation in the	)	RM-7981
Use of New Telecommunications	)	RM-8004
Technologies	)	

SECOND REPORT AND ORDER

Adopted: July 15, 1993 Released: August 13, 1993

By the Commission:

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INTRODUCTION

1. By this action, the Commission reallocates five bands above 3 GHz to the private operational and common carrier fixed microwave services on a co-primary basis and prescribes channelization plans and technical rules to govern their use. These rules ensure that fixed microwave licensees relocating from 1850-1990, 2110-2150, and 2160-2200 MHz frequencies (2 GHz band) will have available alternative frequency bands that are suitable for providing equivalent service with comparable reliability.

2. Today's action follows our reallocation of the 2 GHz band from private operational and common carrier fixed microwave use to emerging technology mobile services, subject to grandfathering provisions and other conditions. The reallocation of 2 GHz frequencies from fixed to mobile use, together with voluntary negotiated moves and the mechanisms further refined today in a companion order, facilitates making available the spectrum necessary for the U.S. telecommunications industry to develop and provide leading edge products and services.[1] Our action in this Second Report and Order, reallocating spectrum in bands above 3 GHz to which 2 GHz fixed licensees may move, ensures that these licensees will not be disadvantaged by the emerging technologies reallocation.

BACKGROUND

3. In the First Report and Order in this proceeding we reallocated to emerging telecommunications technologies the 1850-1990, 2130-2150, and 2180-2200 MHz bands allocated to the Private Operational-Fixed Microwave Service (Part 94) and the 2110-2130 and 2160-2180 MHz bands allocated to the common carrier Domestic Public Fixed Radio Services (Part 21) and Public Mobile Service (Part 22).[2] In taking this action, the Commission stated its intention to make available fixed microwave bands above 3 GHz to reaccommodate incumbent 2 GHz fixed microwave licensees in geographic areas where sharing would not be possible due to potential interference between the services. The

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[1] In our companion order we decide that 2 GHz fixed microwave licensees in spectrum allocated to licensed emerging technology services will not be required to relocate for a period of three years, and 2 GHz fixed licensees in spectrum allocated to unlicensed emerging technology devices will not be required to relocate for a period of one year. We also refine our voluntary negotiation scheme that governs relocation efforts. See Third Report and Order and Memorandum Opinion and Order, ET Docket No. 92-9, released August 13, 1993.

[2] First Report and Order and Third Notice of Proposed Rule Making, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992).

Commission stated that such reaccommodation would be done in a manner that would be advantageous to existing licensees, not disrupt their present communications requirements, and foster introduction of new services using emerging technologies. The Commission set forth a regulatory framework to promote voluntary negotiation between fixed and mobile licensees and relocation of incumbent fixed microwave facilities where necessary.

4. In the Notice of Proposed Rule Making (Notice) we proposed to make available for relocation of existing 2 GHz licensees the 3.7-4.2 GHz (4 GHz), 5.925-6.425 GHz (lower 6 GHz), 6.525-6.875 GHz (upper 6 GHz), 10.7-11.7 GHz (11 GHz), 11.7-12.2, 12.7-13.25, and 17.7-19.7 GHz bands. To provide for this relocation, we proposed a "blanket" waiver of the eligibility requirements in these bands and to apply the technical rules and coordination procedures for each of these bands to the relocated operations.[3]

5. In response to the Notice, the Utilities Telecommunications Council (UTC) and Alcatel Network Systems, Inc. (Alcatel) filed petitions for rule making (RMs 7981 and 8004, respectively). UTC and Alcatel argued that instead of proceeding by waiver the Commission should adopt specific channelization plans and technical rules to accommodate the 2 GHz private and common carrier fixed stations potentially affected by the proposals contained in the Notice. We agreed, and adopted a Further Notice of Proposed Rule Making (Further Notice) amending our original proposal to suggest specific rules to make available the 4, 6, 10.565-10.615/10.630-10.680 (10 GHz)[4], and 11 GHz bands for use by 2 GHz licensees.[5] We also proposed a rechannelization plan identical to that proposed in RM-8004, and made the following additional proposals:

1) Permit aggregation of multiple contiguous channels provided minimum use requirements are met.

2) Permit expansion of existing microwave systems under current channelization plans without waiver.

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[3] Notice of Proposed Rule Making, ET Docket No. 92-9, 7 FCC Rcd 1542 (1992). We also invited comment on the feasibility of making available to 2 GHz fixed users a portion of the 1710-1850 MHz government band. Subsequently, we solicited public comment on the NTIA report entitled "Federal Spectrum Usage of the 1710-1850 and 2200-2290 MHz Bands;" see Public Notice, Mimeo No. 22951, released May 4, 1992.

[4] In its petition, Alcatel proposed that the 10 GHz band be redesignated from point-to-multipoint to point-to-point use.

[5] Further Notice of Proposed Rule Making, ET Docket No. 92-9, 7 FCC Rcd 6100 (1992).

3) Maintain existing coordination procedures and interference standards in each band.

4) Adopt performance and loading standards for digital modulation while maintaining existing voice channel loading requirements and standards for analog modulation.

5) Clarify the automatic transmit power control (ATPC) rules.

6. In the Further Notice we also solicited comment on other technical rules and on imposing time limits for the reservation of growth channels by frequency coordinators. Finally, we stated that we would explore with the National Telecommunications and Information Administration (NTIA) the feasibility of non-government fixed microwave users accessing the 1710-1850 MHz and 3.6-3.7 GHz government bands.

7. Comments were received on the Further Notice in December 1992 and reply comments were received in January 1993. In their comments, the Telecommunications Industry Association, Fixed Point-to-Point Communications Section (TIA) and three U.S. equipment manufacturers [Harris Corporation-Farinon Division (Harris), Digital Microwave Corporation (DMC), and Telesciences, Inc. (Telesciences); Harris, DMC, and Telesciences collectively referred to as the Joint Commenters] propose channel plans substantially different from those proposed in the Further Notice, contending that the proposed plans are spectrally inefficient and anti-competitive. In May 1993, Alcatel submitted supplemental comments in which it proposes a revised channel plan that would combine elements of the channel plans proposed in the Further Notice and those of the TIA and Joint Commenters. We accepted this pleading and requested comment on it by June 14, 1993.[6]

DISCUSSION

8. In general, parties support a co-primary allocation of the 4, 6, 10, and 11 GHz bands to private and common carrier fixed microwave services using Alcatel's revised channel plan. However, several satellite users of the 4 GHz band object to any 4 GHz rechannelization, with some also objecting to the proposed reallocation; and SR Telecom (SRT), a manufacturer of point-to-multipoint equipment, objects to the proposed 10 GHz reallocation. American Telephone and Telegraph Company (AT&T), MCI Telecommunications Corporation (MCI), National Spectrum Managers Association, Inc. (NSMA), and Western Tele-Communications, Inc. (WTCI) offer alternative channel plans in the 4, 6, and 11 GHz bands.

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[6] See Public Notice, May 28, 1993, DA 93-603.

Allocation and Channelization

9. 4 GHz. The 4 GHz band is currently allocated for common carrier fixed and fixed satellite use and is channelized into twelve 20 MHz channel pairs for fixed use. In the Further Notice, we proposed to amend the allocation to include private fixed use on a co-primary basis; and overlap the 20 MHz channel pairs with channels ranging from 400 kHz to 10 MHz.[7]

10. Some satellite users express skepticism about the proposed reallocation. GE American Communications, Inc. (GEAC) states that permitting any migration of 2 GHz microwave licensees to the 4 GHz band would inflict intolerable interference on satellite services. According to GEAC, even if the Commission were to protect existing licensed earth stations against degradation in signal quality, the proposed reallocation would thwart expansion of licensed stations and not protect unlicensed stations. The Satellite Broadcasting and Communications Association (SBCA) concurs, stating that the addition of private microwave users to the 4 GHz band would aggravate terrestrial interference to the nearly four million unlicensed home satellite dishes in this band.

11. Other satellite users, as well as terrestrial users, do not object to the proposed reallocation, but oppose the proposed channel plan. Home Box Office (HBO) contends that rechannelizing the 4 GHz band as proposed would cause irreparable interference to every satellite transponder in this band, since the proposed plan would position terrestrial sources of interference at varying bandwidths from the center frequencies of the transponders. National Public Radio (NPR) states that the proposed channel plan would not accommodate its Public Radio Satellite Interconnection System, the primary artery for satellite distribution of public radio programming in the United States. WTCI, a terrestrial carrier, opposes the proposed channel plan because existing common carrier fixed microwave systems would have to convert their existing equipment to the new plan.

12. TIA and the Joint Commenters propose rechannelizing the band to incorporate 40 MHz channels using the existing 20 MHz channel plan. This plan would retain the twelve existing 20 MHz pairs while adding six overlapping 40 MHz pairs and eliminating all other proposed bandwidths. According to TIA and the Joint Commenters, the 4 GHz band is not the preferred location for displaced narrowband 2 GHz users due to the potential for interference with satellite operations, but it could be used for such high capacity purposes as cellular radio backhaul to major switching centers and future broadband network services.

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[7] Specifically, we proposed twenty-four 400 kHz pairs, twelve 800 kHz pairs, twenty-four 1.6 MHz pairs, twelve 3.2 MHz pairs, six 5 MHz pairs, and twenty-five 10 MHz pairs.

Northern Telecom (Northern) suggests a similar channel plan, stating that the 4 GHz band should be retained exclusively for high capacity systems, but that 40 MHz channels could be derived from the existing 20 MHz plan. According to Northern, the use of 40 MHz channels would provide a significant advantage, since extremely efficient 40 MHz radios have recently become available.

13. MCI agrees that six 40 MHz pairs should be added to the existing 4 GHz channel plan, but also recommends eliminating many of the narrowband channels so that only a limited number of 400 kHz, 800 kHz, and 1.6 MHz channels are included. According to MCI, 40 MHz microwave equipment is becoming available that spectrally is highly efficient and compatible with synchronous optical networks, and this technology cannot be implemented effectively within narrower channels. AT&T, on the other hand, proposes an alternative channel plan that increases the number of narrowband channels to accommodate cellular and planned Personal Communications Services (PCS) links between cell sites and central offices.

14. In reply comments, Alcatel submitted a revised plan that proposed centering narrowband channels on the same frequencies as the existing 20 MHz channels. In its supplemental pleading, Alcatel submitted a further revision that includes only 10 and 20 MHz channels. According to Alcatel, by eliminating the narrowband channels, this plan would not affect most satellite users of the 4 GHz band.

15. The American Petroleum Institute (API) objects to plans that would eliminate channel bandwidths narrower than 10 MHz. According to API, there are over 13,000 low capacity fixed links in the 2 GHz band that must be relocated, and some of these will need to operate at 4 GHz. However, satellite users generally express concern about narrowband, as well as wideband, channels. While NPR states that Alcatel's final plan addresses its concerns, HBO, SBCA, and GTE Service Corporation (GTE) oppose permitting channels of any bandwidth other than 20 MHz. According to GTE, any new channels would operate co-channel with satellite transponder downlink services and eliminate the interference isolation between terrestrial and satellite services that is an inherent feature of the existing 20 MHz channel plan. HBO and GEAC contend that Alcatel's plan does not adequately protect digital transmissions in the 4 GHz band.

16. Based on the parties' comments, we conclude that the existing 20 MHz channel plan should not be modified. While ideally we would like to accommodate both narrowband and wideband channels at 4 GHz, under all of the proposed plans there exists the possibility of interference to the currently-licensed satellite operations. Further, these satellite operations make it unlikely that more than a small amount of new use would be achieved without causing interference. However, we continue to believe it is feasible to permit private as well as common carrier microwave use of the band under the existing channel

plan. Coordination between satellite and terrestrial users can accommodate additional use by terrestrial users, possibly including paths that would be difficult to accommodate in higher bands. Accordingly, we will authorize use of the 4 GHz band by private fixed microwave licensees in addition to common carrier fixed microwave licensees, but decline to change the channelization of the band.

17. 6 GHz. In the Further Notice, we proposed in the lower 6 GHz band to amend the common carrier fixed and fixed satellite allocations to include private fixed use on a co-primary basis; and rechannelize from the current eight 29.65 MHz channel pairs to overlapping twenty-four 400 kHz pairs, twelve 800 kHz pairs, forty-two 1.6 MHz pairs, twenty 3.2 MHz pairs, twelve 5 MHz pairs, twenty-four 10 MHz pairs, and eight 30 MHz pairs. In the upper 6 GHz band, we proposed to amend the private fixed allocation to include common carrier fixed use on a co-primary basis; and rechannelize from the current five 800 kHz pairs, three 1.6 MHz pairs, fifteen 5 MHz pairs, and sixteen 10 MHz pairs to an overlapping twelve 400 kHz pairs, six 800 kHz pairs, forty-five 1.6 MHz pairs, fifteen 5 MHz pairs, and sixteen 10 MHz pairs.

18. In lieu of this 1.6 MHz-based channelization plan, TIA and the Joint Commenters propose a 1.25 MHz-based plan. The Joint Commenters[8] propose rechannelizing the lower 6 GHz band into fifty-six 1.25 MHz channel pairs, twenty-eight 2.5 MHz pairs, sixteen 3.75 MHz pairs, twelve 5 MHz pairs, twenty-four 10 MHz pairs, sixteen 15 MHz pairs, and eight 30 MHz pairs[9]; and the upper 6 GHz band into one hundred thirty 1.25 MHz pairs, sixty-five 2.5 MHz pairs, forty-two 3.75 MHz pairs, thirty-one 5 MHz pairs, and sixteen 10 MHz pairs.

19. TIA and the Joint Commenters maintain that we should adopt their alternative proposal because:

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[8] The TIA plan is very similar to the Joint Commenters plan in all bands. For simplicity, only the Joint Commenters plan is addressed herein.

[9] These figures are the authorized bandwidths; the channel spacings would be slightly less and conform to the existing lower 6 GHz 29.65 MHz channel plan. Specifically, the channel spacings would be 1.23, 2.47, 3.70, 4.94, 9.88, 14.82, and 29.65 MHz, respectively.

1) the majority of U.S. manufacturers do not produce equipment compatible with the Further Notice's 1.6 MHz-based channel plan, and that the proposed plan therefore would place these manufacturers at a competitive disadvantage and impose additional costs on users;

2) a 1.6 MHz-based plan would degrade system performance and increase the cost of relocating 2 GHz licensees by imposing an unduly strict spectral efficiency standard for narrowband (less than 5 MHz bandwidth) channels;

3) spectrum would be used inefficiently by nearly 7000 licensed 3.5 MHz facilities in the 2110-2130/2160-2180 MHz bands that would have to be accommodated in 5 MHz channels under a 1.6 MHz-based plan;

4) spectrum would also be used inefficiently because under a 1.6 MHz-based plan large spectrum remnants would be left when microwave systems aggregate channels and expand from 1.6 MHz to greater bandwidth;

5) the proposed 400 and 800 kHz channels are not needed because these channels would not be cost-effective in higher bands; and

6) a 1.6 MHz plan would be inconsistent with international band plans.

20. In reply comments, Alcatel disputes TIA and the Joint Commenters, asserting that the proposed 1.6 MHz-based channel plan is more spectrally efficient and flexible than a 1.25 MHz-based plan. It contends that a 1.6 MHz-based plan would not impair competition because all manufacturers could easily transition to equipment based upon this plan. Also, Alcatel states that the spectrum efficiency standard upon which the proposed narrowband channel plan is based uses well-established technologies.[10] However, it concurs that the existing

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[10] In its reply comments, Alcatel contends that the proposed 1.6 MHz-based channel plan would use 8-year old 64 quadrature amplitude modulation (QAM) or 49 quadrature partial response (QPR) modem technology in channel bandwidths up to 20 MHz, and 12-year old 16 QAM or 25 QPR modem technology in channel bandwidths of 30 and 40 MHz. This plan would permit the accommodation of 24 voice circuits (DS-1 utilization) in 400 kHz channels, 48 voice circuits (2 DS-1) in 800 kHz channels, 96 voice circuits (4 DS-1) in 1.6 MHz channels, 192 voice circuits (8 DS-1) in 3.2 MHz channels, 288 voice circuits (12 DS-1) in 5 MHz channels, 672 voice circuits (DS-3) in 10 MHz channels, 1344 voice circuits (2 DS-3) in 20 or 30 MHz channels, and 2016 voice circuits (3 DS-3) in 40 MHz channels.

29.65 MHz channel spacing should be retained in the lower portion of the 6 GHz band.

21. In its supplemental pleading, Alcatel changes its recommendation of a 1.6 MHz-based plan and instead proposes a 1.25 MHz-based plan for use throughout the band. Although based on 1.25 MHz, as is the plan proposed by the TIA/Joint Commenters, Alcatel's plan differs from that proferred by the TIA/Joint Commenters in the following respects:

> Lower 6 GHz -- Twenty-four 400 kHz channel pairs, twelve 800 kHz channel pairs, one unpaired 1.25 MHz frequency, one unpaired 2.5 MHz frequency, and three unpaired 3.75 MHz frequencies would be added; and four 3.75 MHz channel pairs and all 15 MHz channel pairs would be eliminated.
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> Upper 6 GHz -- Twelve 400 kHz channel pairs, six 800 kHz channel pairs, four unpaired 1.25 MHz frequencies, two unpaired 2.5 MHz frequencies, and two unpaired 3.75 MHz frequencies would be added; and twelve 3.75 MHz channel pairs would be eliminated.
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> Lower and Upper 6 GHz -- The location of many 1.25, 2.5, and 3.75 MHz channels would be changed; channels of the same bandwidth could be aggregated[11]; and spectrum efficiency requirements would be those proposed in the Further Notice for 400 and 800 kHz -- and 5 MHz and wider -- channels, and those of the

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The 1.25 MHz-based channel plan recommended by the TIA/Joint Commenters would use 16 QAM modem technology for 1.25 and 2.5 MHz channels, 32 QAM modem technology for 3.75 MHz channels, and 64 QAM modem technology for wider channels. This plan would permit the accommodation of 2 DS-1 in 1.25 MHz channels, 4 DS-1 in 2.5 MHz channels, 8 DS-1 in 3.75 MHz channels, 12 DS-1 in 5 MHz channels, DS-3 in 10 MHz channels, 2 DS-3 in 20 MHz channels, 3 DS-3 in 30 MHz channels, and 4 DS-3 (2688 voice circuits) in 40 MHz channels. Thus, the two proposed channel plans have different efficiencies for bandwidths below 5 MHz and above 20 MHz, but identical efficiencies for bandwidths of 5, 10, and 20 MHz.

[11] The Further Notice proposed to permit aggregation of channels, provided minimum payload capacity requirements were met, even if their bandwidths differed; e.g., 400 and 800 kHz channels could be joined to form 1.2 MHz channels. Under Alcatel's compromise proposal, only channels of the same bandwidth could be aggregated; e.g., 800 kHz channels could be joined to form 1.6 MHz channels, but 400 and 800 kHz channels could not be joined to form 1.2 MHz channels.

TIA/Joint Commenters for 1.25, 2.5, and 3.75 MHz channels.[12]

22. Alcatel contends that its revised 1.25 MHz-based plan would meet all of the concerns expressed by the TIA/Joint Commenters and improve frequency planning practices. According to Alcatel, adopting a 1.25 MHz-based plan would permit employing less complex 16 QAM and 32 QAM modems for 1.25, 2.5, and 3.75 MHz channels, and that this would improve path reliability and decrease cost. However, Alcatel asserts that 400 and 800 kHz channels should be added to the plan to permit low capacity requirements to be efficiently satisfied. It states that since approximately 16% of the more than 21,000 licensed analog frequencies in the 1850-1990 MHz and 2130-2150/2180-2200 MHz bands carry only 24 voice circuits and an additional 21% carry only 48 voice circuits, 400 and 800 kHz channels are all that are required to accommodate approximately 37% of existing 2 GHz facilities. Moreover, according to Alcatel, 15 MHz channels would be inefficient because they are proposed to accommodate the same number of voice circuits (672) as 10 MHz channels. Therefore, Alcatel recommends that 15 MHz channels be eliminated. Finally, Alcatel contends that a large number of narrowband channels, particularly 3.75 MHz channels, need to be repositioned to allow for future growth and to avoid frequency offsets that cause carrier beat problems with analog radios.[13] It states that under the TIA/Joint Commenters plan capacity upgrades usually would require a frequency or polarization change, whereas under its plan aggregated channels of the same bandwidth could permit system growth without frequency or polarization changes.

23. API and UTC express concern that the adopted plan have a sufficient mix of narrowband and wideband channels, including channels as narrow as 800 kHz. They propose that if the channel scheme adopted does not contain 800 kHz channels, the Commission should permit systems requiring 800 kHz capacity to use larger bandwidth channels, such as 1.25 MHz. However, while API also supports the adoption of a channel plan that includes 400 kHz channels or the accommodation of 400 kHz requirements in 1.25 MHz

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[12] Thus, a 400 kHz channel would accommodate 24 voice circuits, an 800 kHz or 1.25 MHz channel would accommodate 48 voice circuits, a 2.5 MHz channel would accommodate 96 voice circuits, a 3.75 MHz channel would accommodate 192 voice channels, a 5 MHz channel would accommodate 288 voice circuits, a 10 MHz channel would accommodate 672 voice circuits, a 20 or 30 MHz channel would accommodate 1344 voice circuits, and a 40 MHz channel would accommodate 2016 voice circuits.

[13] Alcatel's proposed repositioning would eliminate sixteen 3.75 MHz channel pairs and add unpaired 1.25, 2.5, and 3.75 MHz frequencies that could be used in one-way systems or as half of a channel pair if another paired frequency were blocked.

channels, UTC says that there is no need for 400 kHz channels, since the minimum bandwidth of 2 GHz fixed systems is 800 kHz.

24. MCI recommends its own plan wherein the band edge spectrum in the lower 6 GHz band would accommodate several 400 kHz, 800 kHz, and 1.6 MHz channels, and the main body of the band would accommodate 20, 30, and 40 MHz channels; and the upper 6 GHz band would accommodate 5 and 10 MHz channels. According to MCI, the channel plan proposed in the Further Notice unnecessarily reduces the number of wideband channels in the lower 6 GHz band. AT&T, Northern, NSMA, Pacific Telesis Group (Pacific), US West, and WTCI express similar concerns. Pacific states that under the plan proposed in the Further Notice, narrowband use could balkanize this band to such an extent that wideband channels in or near metropolitan areas would virtually disappear.

25. The United States Telephone Association (USTA) says that the proposed lower 6 GHz rechannelization from 29.65 to 30 MHz spacing would create a potential beat interference potential between analog systems. USTA therefore recommends that analog systems use the upper 6 GHz band, particularly if the system requires 10 MHz or less of bandwidth. According to USTA, this would preserve the lower 6 GHz band for wideband use. EMI Communications Corporation (EMI) and MRC Telecommunications, Inc. (MRC) recommend that 29.65 MHz channel spacing be retained in place of the proposed 30 MHz spacing to avoid interference. MRC asserts that even if the existing 29.65 MHz channel spacing plan is grandfathered, new licensees that use 30 MHz spacing would significantly change the interference environment, creating incompatible and inefficient use of the lower 6 GHz band.

26. In comments on Alcatel's supplemental pleading, a number of parties offer support for its revised plan, with most of the remaining parties expressing opposition to only a specific provision or two. API, the Joint Commenters, Microwave Networks Incorporated (MNI), Pacific, TIA, and US West endorse the plan either entirely or with minor reservations. Pacific and US West state that the plan is a major improvement over both the plan proposed in the Further Notice and the TIA/Joint Commenters plan because it eliminates narrowband channels blocking more efficient wideband channels. However, Pacific favors permitting 15 MHz channels to be used because it maintains that 10 MHz radios that meet the efficiency standards proposed in the Further Notice are insufficiently robust for some applications. Therefore, it recommends 15 MHz radios for these applications.

27. A few parties continue to express opposition to some aspects of the revised plan. MCI remains opposed to making wideband channels available for narrowband use in the lower 6 GHz band, stating that this band is a model of efficient spectrum use by wideband systems. Comsearch states that the revised plan includes an excessive number of narrowband channels and expresses

skepticism about Alcatel's proposal to aggregate channels.[14] Comsearch states that if aggregation becomes the norm, numerous channel combinations will be created that will be difficult to engineer and administer. MNI and TIA concur with Comsearch on this point and recommend that aggregation be allowed only when no other channels are available, and then only on center frequencies.

28. We conclude that, with the minor change recommended by MNI and TIA regarding aggregation of channels,[15] the revised Alcatel plan is the best alternative for the 6 GHz band. We believe that 6 GHz will be the primary relocation band for 2 GHz licensees, and therefore efficiently accommodating these licensees in this band is of utmost importance. In order to accomplish this task, there is a need to provide for low, medium, and high capacity requirements; and also to provide spectrum for future growth of systems using each of these capacities. The revised 1.25 MHz-based plan permits the accommodation of low capacity 2 GHz licensees in 400[16] and 800 kHz, rather than 1.25 MHz channels, and offers substantial flexibility for systems to grow both through aggregation of like-bandwidth channels and upgraded modem technology.[17] Further, the plan allows lower cost modems to be used for 1.25, 2.5, and 3.75 MHz channels, and permits the accommodation of the nearly 7000 3.5 MHz licensed 2 GHz facilities in 3.75 MHz channels. The plan also eliminates 15 MHz channels that would inhibit long-term efficient use of the band.[18] Finally, by making possible reuse of existing modems

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[14] Comsearch filed comments to Alcatel's supplemental pleading one day late, due to what it asserts was a failure of its delivery service to timely file the comments. We are herein accepting Comsearch's late-filed comments and have considered them in arriving at our decision.

[15] This change is also being made in the 10 and 11 GHz bands.

[16] While the minimum bandwidth at 2 GHz is 800 kHz, Alcatel's assertion that 16% of analog 2 GHz fixed systems accommodate only 24 voice circuits was not disputed. Therefore, under the channel plan being adopted herein, these systems can be accommodated in 400 kHz channels.

[17] For example, a facility accommodating 48 voice circuits in a 1.25 MHz channel could grow via aggregation of three 1.25 MHz channels to a 3.75 MHz channel accommodating 192 voice circuits; and, changing to 128 QAM modulation accommodate 288 voice circuits in the same 3.75 MHz channel. Thus, in this example, using both aggregation and upgraded technology would double spectrum efficiency.

[18] However, during the 3.5 year transition period specified in paragraph 53, infra, 15 MHz channels may be used.

by all manufacturers and minimizing the amount of existing equipment that is rendered obsolete, the plan will promote competition and not provide a short-term advantage to any manufacturer.[19]

29. We recognize that existing wideband common carrier licensees of the lower 6 GHz band are apprehensive about new narrowband use of the band. However, as noted by Pacific and US West, the channel plan that we are adopting permits efficient use by both wideband and narrowband users. Further, as recommended by several parties, we are retaining 29.65 MHz channel spacing in this band rather than the proposed 30 MHz spacing. This will eliminate the potential interference to analog systems discussed by USTA. Therefore, we see no need to restrict analog systems to the upper 6 GHz band. Accordingly, we are adopting our proposed 6 GHz reallocation and will use the revised 1.25 MHz-based channel plan as discussed above and as set forth in Appendix A.

30. 10 GHz. In the Further Notice, we proposed to reallocate this band from private and common carrier point-to-multipoint (Digital Termination Service (DTS) and Digital Electronic Message Service (DEMS), respectively) use to private and common carrier point-to-point fixed use on a co-primary basis; and channelize into an overlapping twenty-four 400 kHz pairs, twelve 800 kHz pairs, thirty 1.6 MHz pairs, twenty 2.5 MHz pairs, and eight 5 MHz pairs.

31. SRT argues that our proposal to eliminate the band from point-to-multipoint use is premature and ill-advised. SRT says that it is developing reasonably-priced, spectrally-efficient Time Division Multiple Access equipment for point-to-multipoint systems at 10 GHz that will satisfy latent demand that has gone unmet due to the high cost of currently-available equipment. While SRT acknowledges that point-to-multipoint spectrum is available in the 18 GHz band, it says that equipment in this band is very expensive. Therefore, in SRT's view, the Commission should retain the 10 GHz band for point-to-multipoint use, or alternatively, either reallocate the band for shared point-to-point and point-to-multipoint use or designate some channels for exclusive point-to-multipoint use.

32. Alcatel disagrees with SRT, stating that using the 18 GHz band for point-to-multipoint use is feasible and that future PCS systems will also provide point-to-multipoint service. Alcatel asserts that co-primary sharing of the 10 GHz band by

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[19] Alcatel's original plan would have rendered obsolete a 6 GHz radio manufactured by Telesciences that will be usable under the revised plan. While the revised plan does obsolete several radios manufactured by various companies, all of this equipment except a 15 MHz Harris radio would also be obsolete under the TIA/Joint Commenters plan.

point-to-point and point-to-multipoint systems would present extremely difficult frequency coordination problems, since the latter transmit omnidirectionally over a large geographic area, thus preempting point-to-point use. Further, according to Alcatel, 18 GHz point-to-multipoint equipment is less expensive than comparable 10 GHz equipment.

33. Comsearch states that prior coordination and licensing of 10 GHz point-to-multipoint end user locations should be required, so that point-to-point users are not precluded from large portions of the band. The Bell Atlantic Companies (Bell Atlantic) disagree, stating that Comsearch's proposal could result in a displaced 2 GHz microwave licensee blocking a point-to-multipoint user from expanding. Bell Atlantic recommends that we adopt our proposal to preserve the ability of point-to-multipoint operators to continue to provide full service capabilities to end users. NSMA generally concurs with Bell Atlantic's comments.

34. TIA and the Joint Commenters contend that the Commission's proposal to introduce a 1.6 MHz-based channel plan at 10 GHz while retaining the 1.25 MHz-based plan that is currently used in the 10.550-10.565/10.615-10.630 GHz point-to-point portions of the 10.550-10.680 GHz band would substantially reduce the number of available channels. The Joint Commenters state that if the Commission's 10 GHz proposal is adopted, point-to-point users would be licensed under two channel plans and that a licensee's use of channels under the first plan would limit another licensee's ability to use channels under the second plan. According to the Joint Commenters, such a dual channel plan would result in 2.6 MHz of unusable spectrum remnants. Therefore, the Joint Commenters propose that the 1.25 MHz-based plan be retained throughout the 10.550-10.680 GHz band. Specifically, the Joint Commenters propose that this band be rechannelized to:

1) expand the number of 1.25 MHz channel pairs from four to fifty-two;

2) expand the number of 2.5 MHz channel pairs from six to twenty-six;

3) expand the number of 3.75 MHz channel pairs from four to seventeen; and

4) add thirteen 5 MHz channel pairs.

35. In its supplemental pleading, Alcatel replies that while a 1.6 MHz-based plan is more efficient than a 1.25 MHz-based plan at 10 GHz, it is willing to accept a revised 1.25 MHz-based plan similar to its revised plan at 6 GHz. Specifically, its 10 GHz plan proposes to permit aggregation of like-bandwidth channels and to use the same spectrum efficiency standards as at 6 GHz. It also proposes to:

1) add twenty-four 400 kHz channel pairs and twelve 800 kHz channel pairs;

2) eliminate six 3.75 MHz channel pairs and two 5 MHz channel pairs; and

3) relocate a number of 3.75 MHz channels.

36. TIA and the Joint Commenters generally support Alcatel's revisions. UTC, however, recommends that 400 kHz channels be eliminated from the plan, based on its belief that they are unnecessary and not cost-effective.

37. Regarding our proposal to redesignate the 10 GHz band from point-to-multipoint to point-to-point use, we find no support for SRT's contention that the 18 GHz band is not viable for point-to-multipoint use. Reasonably-priced equipment can be developed at 18 GHz that will accommodate the likely point-to-multipoint demand. We also do not want to disadvantage existing 10 GHz DTS and DEMS licensees, and therefore will permit existing 10 GHz DTS and DEMS systems to expand to include additional end user locations on existing channels and to add channels in authorized service areas. However, to minimize the possibility of interference between point-to-point and grandfathered DTS and DEMS systems, we will require grandfathered DTS and DEMS licensees to prior frequency coordinate with point-to-point licensees pursuant to Section 21.100(d).[20] We are not accepting 10 GHz DTS and DEMS systems applications for new service areas.

38. With regard to channelizing the 10 GHz band, we concur with TIA and the Joint Commenters that a 1.25 MHz-based channel plan is superior to a 1.6 MHz-based plan. As they note, current point-to-point use in adjacent spectrum is based upon a 1.25 MHz plan, and introducing a 1.6 MHz-based plan could create confusion and inefficiency, as well as rendering several existing 1.25 MHz-based radios in the 10.550-10.565/10.615-10.630 GHz bands unusable in the 10.565-10.615 and 10.630-10.680 GHz bands.[21] Additionally, while the U.S. is not obligated to follow international band plans, a 1.6 MHz plan would be inconsistent with the 10 GHz plan recommended by the Consultative Committee International for Radio.[22] Regarding which proposed 1.25 MHz-

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[20] Grandfathered DTS and DEMS systems are those systems that are licensed, in operation, or have applications pending prior to July 15, 1993.

[21] The Joint Commenters manufacture six 10 GHz radios that are usable under a 1.25 MHz plan, but that would be unusable under a 1.6 MHz-based plan.

[22] This Committee is now the International Telecommunication Union Radiocommunications Sector Study Group.

based plan is more desirable, we find merit in Alcatel's revised plan for reasons similar to those discussed in our 6 GHz decision, supra. While we anticipate that most low capacity 2 GHz licensees will choose to relocate to the 6 GHz band, we believe it prudent to provide additional 400 and 800 kHz channels at 10 GHz. Moreover, there may be new low capacity requirements, such as interconnecting future PCS cell sites. Alcatel's latest plan also would better provide for system growth by repositioning some 3.75 MHz channels and permitting aggregation of like-bandwidth channels. Accordingly, we are adopting our proposed 10 GHz reallocation and will use a revised 1.25 MHz-based channel plan as set forth in Appendix A.

39. 11 GHz. In the Further Notice, we proposed to amend the common carrier fixed allocation in the 11 GHz band to include private fixed use on a co-primary basis; and to rechannelize from twelve 40 MHz pairs to overlapping fifty 10 MHz pairs and sixteen 30 MHz pairs. TIA and the Joint Commenters recommend that the Commission make available a wide range of narrowband and wideband channels. Specifically, the Joint Commenters propose that the band be channelized into seventy-six 1.25 MHz channel pairs, thirty-eight 2.5 MHz pairs, twenty-four 3.75 MHz pairs, nineteen 5 MHz pairs, fifty 10 MHz pairs, twenty-four 20 MHz pairs, thirteen 30 MHz pairs, and twelve 40 MHz pairs. TIA and the Joint Commenters argue that this channel plan will encourage greater utilization of the 11 GHz band. Northern offers some support for this plan, stating that while it is reluctant to support narrowband and wideband channel use of the same band, sharing two 40 MHz pairs with 1.25, 2.5, 3.75, 5, and 10 MHz pairs may be feasible, and is more desirable at 11 GHz than at 4 or 6 GHz. MCI also recommends a mix of narrowband and wideband channels similar to its proposed 4 and 6 GHz channel plans, wherein the band edge spectrum would accommodate several 400, 800, and 1600 kHz channel pairs, and the main body of the band would be fully channelized with 20, 30, and 40 MHz channels.

40. Several parties favor retaining the 11 GHz band exclusively for wideband channel use. AT&T, NSMA, Pacific, US West, and WTCI express concern that neither the channel plan proposed in the Further Notice nor the TIA/Joint Commenters plan adequately accommodates the needs of existing wideband common carrier users. NSMA and WCTI propose retaining the existing 40 MHz channel plan and state that the existing plan is compatible with new spectrum-efficient communications services.

41. Alcatel argues that narrowband channels at 11 GHz are not as desirable as in lower bands, since the band is affected by rain outage. In its supplemental pleading, it asserts that the 11 GHz plan proposed in the Further Notice is the most efficient, but that in view of the need expressed in the comments for narrowband and 40 MHz channels, it proposes a revised plan that is similar to the Joint Commenters' except for:

1) permitting aggregation of like-bandwidth channels and using the same spectrum efficiency standards as at 6 and 10 GHz;

2) eliminating twenty 1.25 MHz channel pairs, ten 2.5 MHz channel pairs, ten 3.75 MHz channel pairs, five 5 MHz channel pairs, and all 20 MHz channel pairs; and

3) relocating a number of channels.

42. Pacific and US West state that Alcatel's revised plan largely eliminates their concerns because it permits much more efficient use of wideband channels.[23] TIA and the Joint Commenters also support the revised Alcatel plan, but MCI opposes it, contending that it would permit the availability of fewer 30 MHz pairs than MCI requires.

43. We believe that flexibility is desirable and that there is merit in permitting a wide range of narrowband and wideband channels at 11 GHz. While a number of parties correctly observe that eliminating or restricting narrowband channels from the 11 GHz plan would better accommodate wideband users, the same is true in the 6 and 10 GHz bands. Our goal is not to favor either narrowband or wideband users, but to treat each group equitably. While this means that a flexible channel plan may not be ideal for any one user, we find that it is desirable for all users combined. Accordingly, we are adopting our proposed 11 GHz reallocation proposal and will use a revised 1.25 MHz-based channel plan, as set forth in Appendix A.

44. Minimum Channel Loading and Data Rates. In the Further Notice, we proposed changes to Sections 21.122(a)(2) and 94.94 to require the following minimum data rates in the 4, 6, 10, and 11 GHz bands for systems using digital modulation:

Channel Bandwidth	Minimum Data Rate (Megabits per Second)
400 kHz	1.54 (DS-1 utilization)
800 kHz	3.08 (2 DS-1 utilization)
1.6 MHz	6.17 (4 DS-1 utilization)
3.2 MHz	12.3 (8 DS-1 utilization)
5.0 MHz	18.5 (12 DS-1 utilization)
10 MHz	44.7 (DS-3 utilization)
20 and 30 MHz	89.4 (2 DS-3 utilization).

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[23] To permit greater system gain, Pacific makes the same recommendation at 11 GHz as it did at 6 GHz; namely, that 15 MHz radios should be allowed to operate under the proposed efficiency requirements for 10 MHz radios. For the reason given in paragraph 28, supra, we are not adopting this proposal; however, as mentioned in note 18, supra, 15 MHz channels will be permitted during the 3.5 year transition period.

45. Additionally, we proposed that digital systems using bandwidths of 10 MHz and greater be required to load to at least 50% of capacity. Finally, we proposed no change to Section 21.710(c) of the rules, which provides that microwave systems must meet a minimum loading requirement of 900 voice channels (4 kHz or equivalent) within five years, or operate at a minimum data rate of 10 Mb/s in the 4, 6, and 11 GHz common carrier bands.[24] Where transmitters employing digital modulation techniques are designed to be used so that two may simultaneously operate on the same frequency over the same path, the minimum number of voice channels is reduced to 500.

46. EMI and Motorola, Inc. express concern that some 2 GHz microwave users may be disadvantaged or discouraged from relocating to bands above 3 GHz by the above loading standards. Motorola urges the Commission to announce a liberal loading standard waiver policy for existing 2 GHz licensees that are relocated. UTC argues that wideband common carrier loading standards will be particularly burdensome on narrowband private users, and proposes that the Commission not require loading standards for private microwave systems operating in any of the bands above 3 GHz or, alternatively, not enforce loading standards on private systems occupying bandwidths of less than 10 MHz. UTC recommends that if loading standards are adopted for private systems, they be based on loading after five years.

47. TIA and the Joint Commenters state that applicants for wideband channels (10 MHz and greater) should be required to submit more extensive justification than other applicants; e.g., that their stated requirements cannot be met with a narrower channel, that they will be able to satisfy the loading requirement for wideband channels, and -- for Part 94 applicants who plan to resell excess capacity -- that they submit contracts with their applications as evidence of demand for such capacity. Further, TIA and the Joint Commenters recommend that wideband channel applicants be required to demonstrate an immediate need for channel loading of at least 50 percent of capacity, that the Commission authorize independent auditors to examine loading of existing systems, and that the minimum digital data utilization rates for 30 and 40 MHz channels should be 3 DS-3 and 4 DS-3, respectively.

48. In reply comments, Alcatel contends that the utilization rates recommended by TIA and the Joint Commenters are too stringent to achieve desirable path reliability, and recommends that the utilization rate for 30 MHz channels be the proposed 2 DS-3 and that the rate for 40 MHz channels be 3 DS-3. In supplemental comments, TIA recommends a compromise wherein the 3 DS-3 utilization rate would apply to 40 MHz channels and 30 MHz channels in the 6 GHz band, with a 2 DS-3 rate being used for

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[24] For bandwidths of 20 MHz or less in the 11 GHz band, the minimums are 240 voice channels and a data rate of 5 Mb/s.

30 MHz channels in the 11 GHz band. TIA further proposes a compromise on the timing for licensees meeting the 50% wideband channel loading requirement, recommending that it be met after 2.5 years, rather than immediately.

49. US West opposes any loading standards on common carrier use of wideband channels. It contends that warehousing of spectrum is not a serious problem and that, to the extent that it occurs, can be addressed throught a complaint proceeding. It also objects to the 3 DS-3 utilization requirement for 30 MHz channels recommended by TIA and the Joint Commenters, contending that this requirement would significantly increase cost and lower path reliability and transmission performance, particularly at 11 GHz, in which rain attenuation affects path availability. UTC concurs, stating that a higher efficiency requirement would limit the ability of private microwave systems to replace an analog link with a digital one in some of the more difficult path configurations, particularly in the 11 GHz band.

50. TIA and the Joint Commenters recommend that the proposed new digital efficiency requirements be implemented over a five year period to permit existing equipment to be used for a longer period of time. The Joint Commenters state that no matter which channel plan is adopted, several relatively new radios will be rendered obsolete. Northern concurs that a five year transition period is appropriate, but Alcatel states that only a two year transition period is needed. In reply comments to Alcatel's revised channel plan, TIA and MNI recommend a compromise transition period of 3.5 years.

51. The Public Broadcasting Service (PBS) expresses concern that the proposed digital data rates would be burdensome for the common carrier microwave links that soon will be needed to relay digitally encoded motion video material, such as compressed NTSC and HDTV, to broadcast satellite distribution systems. PBS states that the efficiency standard in proposed Section 21.122(a)(2) requires QAM, which cannot be used by earth stations for satellite communications due to power limitations aboard satellites. Rather, according to PBS, quadrature phase shift keyed (QPSK) modulation must be used for such communications. Therefore, PBS argues, a common carrier microwave system carrying digital motion video material to a satellite earth station would be required to use QAM for the terrestrial link and QPSK for the satellite link, adding complexity to system control and new costs to the program distribution chain. PBS notes that although satellite broadcasters usually use Part 74 broadcast auxiliary service links to connect with earth stations, sometimes they must order service from common carriers. Accordingly, it recommends an exception to proposed Section 21.122(a)(2), permitting common carrier microwave systems carrying digital motion video material to use alternative modulation, provided that they comply with the 1 bit/sec/Hz requirement of Section 21.122(a)(1).

52. We concur with the consensus of the commenters that many existing 2 GHz licensees may not easily meet the existing and proposed loading standards, and that a transition period is appropriate to permit manufacturers to meet the proposed digital data rates. However, we also want to ensure that channels are used as efficiently as possible in a timely manner. Therefore, we are maintaining our existing voice channel loading requirements and are adopting our proposed digital loading standards for channels of 10 MHz and greater bandwidth, but will liberally waive loading requirements in accommodating displaced 2 GHz licensees in the bands above 3 GHz.

53. We also are adopting our proposed digital data rates except for 30 MHz channels at 6 GHz, in which we will require the more efficient 3 DS-3 utilization rate proposed by TIA and the Joint Commenters.[25] We concur with them that this rate is achievable for 30 MHz channels at 6 GHz, but agree with the consensus of commenting parties that this rate is inappropriate for 30 MHz channels at 11 GHz because of the more difficult path reliability problems inherent in use of this band. Therefore, as proposed in the TIA compromise plan, we will use a 2 DS-3 rate for 30 MHz channels at 11 GHz. As also proposed by TIA in its compromise plan, we are specifying a 3.5 year transition period ending June 1, 1997 for new equipment to meet the adopted data rates; i.e., equipment that does not meet these rates must be in service, authorized, or applied for by June 1, 1997. While determining the optimum transition period is difficult, we believe a 3.5 year period is adequate, given adoption of a channel plan that permits existing modems of all manufacturers to be used. To minimize the use of equipment that does not meet the new efficiency standards, we are imposing a deadline of July 15, 1994, for the manufacture or importation of such equipment.[26] This deadline will permit manufacturers to exhaust inventories prior to the June 1, 1997 transition date and meet the near-term equipment needs of users, while also ensuring that less efficient equipment is phased out in an expeditious manner. The new rules are specified in Appendix A.

54. We also are adopting TIA's compromise proposal that 2.5 years be permitted for licensees of wideband (10 MHz and greater) channels to meet the 50% channel loading requirement. We believe that this period represents a reasonable middle ground between those who believe that this requirement should be met immediately and those who believe that no loading requirement is

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[25] We also are adopting the 3 DS-3 rate for 40 MHz channels. These channels were not proposed in the Further Notice; therefore no data rate was specified. However, Alcatel, TIA, and the Joint Commenters all support this rate and no party opposes it.

[26] This deadline will not apply to equipment manufactured for export.

necessary. We are not adopting the TIA/Joint Commenters proposals regarding additional requirements for use of wideband channels because we believe our loading requirements are sufficient to deter inefficient use of these channels.

55. Finally, we find PBS's proposal to permit use of alternative modulation techniques for the carriage of digital motion video material to be desirable. Its adoption would ensure that digital broadcasting satellite needs are met. No commenting party opposes this exception. Accordingly, we will permit alternative modulation to be used for this purpose, provided that the bit rate standard of Section 21.122(a)(1) is met, as specified in Appendix A.

56. Expansion of Existing Systems Under Current Channel Plans in Bands Above 3 GHz. McCaw, Northern, NSMA, Pacific, and WCTI support our proposal to permit expansion of existing microwave systems under current channel plans. According to these parties, new channels adding to existing systems must follow the previous channel plan or intra-system interference will result. Several propose that our rules be modified to make such expansion permissible. Alcatel states that system routes in existence when the Further Notice was adopted should be permitted reasonable expansion without excessive retuning; i.e., expansion of existing frequency plans should be allowed without waiver after a valid showing to the Commission.

57. We concur with the consensus expressed in the comments. While coordination between existing and future microwave systems that use different channel plans will be necessary to ensure that inter-system interference does not result, we do not believe it necessary to disadvantage existing licensees by preventing expansion of their systems. Further, since the rechannelization plans that we are adopting essentially overlay narrowband channels on existing wideband channels, such expansion is compatible with use under the revised plans. Accordingly, we are adopting our proposal to permit expansion of existing microwave systems under current channel plans, as specified in Appendix A.

58. Coordination Procedures and Interference Standards. Alcatel supports the Commission's proposal to maintain Part 21 coordination procedures and interference standards in the 4, 6, 10, and 11 GHz common carrier bands and Part 94 procedures and standards in the 6 GHz private band. API and Northern Telecom concur with respect to coordination procedures, and UTC and WCTI concur with respect to interference standards. These five parties generally maintain that existing procedures and/or standards would be least disruptive to licensees in each band. GTE supports using existing coordination procedures temporarily, but says that the Commission should set forth a plan to harmonize private and common carrier procedures.

59. TIA and the Joint Commenters recommend that both coordination procedures and interference standards be harmonized

in all bands without further delay, noting that equipment used by private and common carriers increasingly is becoming similar and that private and common carrier microwave applications are processed by the same Commission personnel. They propose that Part 21 coordination procedures be used, contending that these procedures ensure that licensees potentially affected by a proposed new licensee will be notified; and that Part 94 interference standards be used, contending that these standards have proven to provide sufficient protection and are administered by a recognized standards body (TIA TR14.11). AT&T, Comsearch, EMI, McCaw Cellular Communications, Inc., NSMA, USTA, UTC, and WTCI concur that Part 21 coordination procedures should be used in all bands. Several of these parties argue that if procedures are not made uniform, there would be an incentive for microwave users to migrate to the upper 6 GHz band, in which less stringent Part 94 procedures would remain in place.

60. We concur with the TIA/Joint Commenters' proposal to use Part 21 coordination procedures and Part 94 interference standards in all bands. Currently, the basic differences are that in common carrier bands new users must notify potentially-affected licensees of their planned use, whereas there is no such requirement in private bands; and that common carrier interference standards are somewhat less stringent than private standards. There is a clear consensus to use common carrier coordination procedures in shared bands, and common carrier and private interference standards are converging. Further, we believe it essential that one organization administer interference standards. Accordingly, we are adopting uniform Part 21 coordination procedures and Part 94 interference standards for the 4, 6, 10, and 11 GHz bands, as set forth in Appendix A.

61. Reservation of Growth Channels. The Further Notice solicited comment on whether frequency coordinators should establish time limits for the reservation of growth channels, such as a six month reservation period.[27] Pacific opposes limiting the period during which frequencies can be reserved for future growth to as short as six months. According to Pacific, a six-month period forecloses a carrier's ability to plan. Comsearch and EMI concur, stating that the reservation of growth channels is a necessity in the common carrier microwave industry. According to these two parties, most high capacity microwave licensees do not realize an immediate return on their investment, and that without a reservation of channels the economic incentive to build systems would disappear. Northern generally supports the current procedures for reservation of growth channels for Part 21 wideband users, but does not believe that it is necessary to reserve growth channels with less than 20 MHz bandwidth

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[27] Growth channels are those channels not required at present but that are anticipated to be required in the future.

because, in Northern's view, it would be more efficient to install a wideband channel.

62. TIA and the Joint Commenters disagree with the above parties, stating that reserving channels can be used to block expansion of other systems. TIA recommends that unlicensed spectrum reserved by a user be made available for licensing by others on a first come, first served basis upon a showing that no other channels can be coordinated. It further recommends that the Commission administer any reservation of growth channels. UTC generally concurs, stating that with the significant increase in bandwidth available to carriers under the proposed channelization plans, there is no need for carriers to retain the ability to reserve growth channels on an indefinite basis. In UTC's view, while coordinators should be encouraged to avoid blocking other users' access to growth spectrum, there is no reason for the Commission to institutionalize the warehousing of spectrum by permitting repeated renewals of coordination notifications. UTC suggests that the Commission amend Section 21.100(d)(2)(x) of the rules to limit the ability of licensees to renew their coordination notification to one six month period after the expiration of the original notification period, and to prohibit recoordination for at least six months if no application is filed during this twelve month period.

63. Given the necessity of accommodating additional licensees in the 4, 6, 10, and 11 GHz bands, it is essential that valuable spectrum not lie idle. While commenting parties have convinced us that mandating that channels be reserved for no more than a specific period would be arbitrary, we concur with TIA that a reserved channel should be made available to another licensee upon a showing of need. Adopting this change will permit growth channels to continue to be reserved while ensuring that the needs of all microwave licensees are met. Accordingly, we are adopting this rules change, as specified in Appendix A; however, we will continue to permit frequency coordinators to administer the reservation process and will become involved only if a dispute arises as to channel availability.

64. Antenna Standards. The Further Notice proposed antenna standards for the 10 GHz band that reflect the proposed reallocation from point-to-multipoint to point-to-point use, and listed the current standards for the 4, 6, and 11 GHz bands. MCI states that these standards must be made more stringent for category A antennas.[28] Otherwise, according to MCI, new narrow- bandwidth single-frequency users who do not foresee a need to expand their own systems will build paths that will block future expansion of wide-bandwidth, multiple-frequency paths licensed to others. MCI asserts that the Commission, with input

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[28] Category A antenna standards are used in areas of frequency congestion, while category B antenna standards are used in uncongested areas.

from manufacturers and other interested parties, could readily develop new category A requirements that permit greater spectrum reuse.

65. Comsearch agrees that category A antenna standards need to be amended, due to increasing congestion caused by introduction of private microwave systems into common carrier bands. Also, according to Comsearch, a detailed definition of congested areas or zones where only category A antennas can be used needs to be specified, and an updated list of congested private microwave areas is needed. GTE recommends that new microwave systems in the 4 and 6 GHz bands be implemented using state-of-the-art antennas, but says that antennas in existing systems should be upgraded only if using these antennas results in interference or prevents the implementation of a new service. USTA supports the development of uniform standards in all bands for both common carriers and private users. It states that allowing licensees to use category B antennas could lead to further congestion and require new entrants to coordinate around systems with sub-standard antenna systems. Therefore, it proposes that the Commission update and improve the category A standards for use by all carriers to maximize efficiency and permit full use of available bands.

66. API disagrees with the above parties, stating that the Commission should not impose new antenna standards on private microwave systems. In API's view, Part 94 licensees should be able to continue to use antennas meeting the minimum standards set forth in Section 94.75 of the rules to avoid having to change locations or replace tower structures.

67. Commenting parties have raised potentially valid concerns about our existing antenna standards. However, we do not have sufficient information at this time to propose changes to these standards. Accordingly, we are adopting the proposed standards, with some minor modifications, as specified in Appendix A, and encourage industry organizations and other interested parties to explore the need for modifying the standards in all of the reallocated bands.

68. Automatic Transmit Power Control. The Further Notice stated that ATPC is permitted under both Parts 21 and 94 of our rules provided that the change in effective radiated power (ERP) is no greater than 3 decibels (dB), and proposed to clarify this point. Northern agrees that ATPC should be explicitly authorized in the rules. Comsearch recommends that the rules be revised to include a definition of ATPC that would allow for variable power operation below a transmitter's maximum authorized power, but says that implementing ATPC should be left to frequency coordinators. In this regard, Comsearch endorses the technical guidelines developed by NSMA for the development of ATPC. NSMA requests that the Commission allow industry associations such as itself and TIA to define appropriate procedures to be used in dealing with ATPC systems during interference analysis.

Alcatel and USTA concur that established industry bodies should be permitted to establish the appropriate ATPC standards.

69. The Joint Commenters propose that the ATPC rules allow up to a 10 dB increase in power, asserting that this could permit closer spacing of microwave systems and that the potential for interference would be insignificant. However, GTE states that this large an increase in power could significantly degrade satellite system performance. It therefore proposes that ATPC systems operate with restrictions to prevent interference to satellite services. Specifically, GTE proposes that the Commission limit the difference between coordinated and licensed power and impose restrictions on the percentage of time that ATPC systems are permitted to operate above coordinated power.

70. We believe our proposal to clarify that ATPC is permitted up to a 3 dB increase in power is appropriate. However, commenting parties have raised issues that we believe can best be addressed by industry groups such as TIA and NSMA. Accordingly, we are adopting our proposed ATPC rules changes, as specified in Appendix A, and encourage industry groups to explore in greater detail under what circumstances ATPC should be authorized and whether a greater increase in power than 3 dB would be appropriate.

71. Other Technical Issues. There was little comment on our other technical proposals regarding minimum path length requirements; frequency diversity transmissions; and power, emission, and bandwidth limitations. However, Alcatel notes that the listed Section 94.73 power limitations for the 21,200 to 23,600 and 38,600 to 40,000 MHz bands differ from those currently authorized in Section 21.107, and that Section 94.73 does not list the 27,500 to 29,500 MHz band, as does Section 21.107. It therefore recommends making Section 94.73 consistent with Section 21.107. Also, MCI states that the path length and equivalent isotropic radiated power (EIRP) limitations proposed in Sections 21.710 and 94.79 do not provide a continuum for allowed EIRP at the minimum path length point. MCI therefore proposes that the step function in the allowed EIRP be eliminated.

72. Regarding Alcatel's recommendations, the listed Section 94.73 power limitations for the 21,200 to 23,600 and 38,600 to 40,000 MHz bands are those currently in effect, rather than proposals. While they differ from the power limitations authorized for the same bands under Section 21.107, these bands are not the subject of this proceeding. With respect to 27,500 to 29,500 MHz, this band is not authorized or proposed for Part 94 use. Similarly, regarding MCI's proposal, the step function that it refers to is not a proposal but currently exists in the rules. Accordingly, we are not acting upon Alcatel's or MCI's recommendations at this time, and are adopting our technical proposals regarding minimum path length requirements; frequency diversity transmissions; and power, emission, and bandwidth limitations, as specified in Appendix A. We note, however, that

we are currently reviewing both the Part 21 and Part 94 technical rules, and anticipate issuing in the near future a proposal to update and consolidate these rules.

73. Use of Government Spectrum. The majority of commenting parties urge that government spectrum at 1710-1850 MHz and/or 3.6-3.7 GHz be made available to non-government users. AT&T says that public safety 2 GHz incumbent operators in spectrum allocated for unlicensed PCS applications should be given priority access to any spectrum in the 1710-1850 MHz band that becomes available as a result of negotiations with NTIA. Alcatel maintains that the Commission's decision not to pursue reallocation of the 3.6-3.7 GHz band limits the spectrum available and thus exacerbates the potential capacity problem of displaced 2 GHz incumbents.

74. As noted in the Further Notice, we are discussing with NTIA non-government access to the 1710-1850 MHz and 3.6-3.7 GHz bands. In August 1992, NTIA released a report, "Feasibility of Relocating Non-Government Fixed Systems into the 1710-1850 MHz Band," stating that there is sufficient spectrum in many areas of the United States to accommodate a limited number of non-government 2 GHz microwave links in the 1710-1850 MHz government band.[29] NTIA further stated that it will cooperate with the Commission to provide spectrum in the 1710-1850 MHz band for relocating fixed microwave links that cannot operate reliably at 6 GHz, establish technical rules and coordination procedures necessary to identify such links, evaluate the feasibility of relocation in the 1710-1850 MHz band, and if feasible, implement such relocation.[30] We will continue our discussions with NTIA, but the result is uncertain. We believe that the action taken today ensures that the spectrum needs of all potentially displaced 2 GHz users will be adequately met. However, if the 3.6-3.7 GHz band is made available, it will provide an additional resource that may lessen the costs of meeting these needs. Accordingly, we are continuing discussions with NTIA, and will issue progress reports as appropriate.[31]

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[29] NTIA Report 92-286. This report was placed in the ET Docket No. 92-9 file.

[30] See Letter dated August 11, 1992, from the Assistant Secretary for Communications and Information, U.S. Department of Commerce, to the Chairman of the FCC. This letter accompanied the "NTIA Feasibility Report." The issue of priority access to the 1710-1850 MHz band by 2 GHz public safety incumbents is addressed in our companion Third Report and Order and Memorandum Opinion and Order.

[31] We note that pursuant to PL 103-66, 107 Stat 312, enacted on August 10, 1993, the Secretary of Commerce must identity and transfer to the Commission not less than 200 megahertz of government spectrum for non-government use.

75. Summary. Our reallocations permit shared private and common carrier fixed microwave use of the 4, 6, 10, and 11 GHz bands, and our channelization plans are designed to accommodate displaced 2 GHz fixed licensees in the most efficient manner. We have chosen not to rechannelize the 4 GHz band in order to minimize the possibility of harmful interference to existing users of this band, and have chosen a compromise 1.25 MHz-based channel plan in the remaining bands in order to accommodate in the most desirable manner the needs of existing and future users of these bands. We believe this plan can optimally accommodate most displaced 2 GHz licensees, as well as ensuring that most existing equipment remains usable. The plan will permit flexibility for both microwave users and manufacturers and encourage a competitive market for the supply of equipment. Additionally, the coordination procedures and technical rules that we have adopted will promote fair and efficient use of the bands.

PROCEDURAL MATTERS

Final Regulatory Flexibility Analysis

76. Pursuant to 5 U.S.C. Section 603, an initial Regulatory Flexibility Analysis was incorporated in the Further Notice of Proposed Rule in ET Docket No. 92-9. Written comments on the proposals in the Further Notice, including the Regulatory Flexibility Analysis, were requested.

77. Need for and Objective of Rules. Our objective is to reaccommodate current 2 GHz common carrier and private fixed microwave licensees above 3 GHz with appropriate channelization plans and technical rules. Reaccommodation of these licensees is necessary to ensure that they can continue to provide equivalent service with comparable reliability.

78. Issues Raised by the Public in Response to the Initial Analysis. Many parties suggested modifications to the proposed reallocations, rechannelization plans, and technical rules, although not specifically to the initial regulatory flexibility analysis. As a result, we have modified our proposals as appropriate. For example, in the Further Notice we had proposed to use a 1.6 MHz-based channel plan in the 4, 6, and 10 GHz

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All of the spectrum to be transfered must be below 5 GHz, and one-half must be below 3 GHz; not less than 50 megahertz of the 200 megahertz must be recommended for immediate reallocation within six months of the statute's enactment, 25 megahertz of which must be below 3 GHz. While it is possible that spectrum in the 1710-1850 MHz and 3.6-3.7 GHz bands may be used to satisfy this requirement, it would be premature to base our decision herein on that possibility.

bands, and a 10 MHz-based plan in the 11 GHz band; however, commenting parties have convinced us that the existing 20 MHz channel plan is more appropriate in the 4 GHz band, and that a 1.25 MHz-based plan is more appropriate in the 6, 10, and 11 GHz bands.

79. Any Significant Alternative Minimizing Impact on Small Entities and Consistent With Stated Objectives. We have reduced burdens wherever possible. The regulatory burdens we have retained are necessary in order to ensure that the public receives the benefits of continued fixed microwave service in a prompt and efficient manner. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. The Secretary shall send a copy of this Second Report and Order to the Chief Counsel for Advocacy of the Small Business Administration.

80. Accordingly, IT IS ORDERED that Parts 2, 21, 22, and 94 of the Commission's rules and Regulations ARE AMENDED as specified below, effective 90 days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A-- RULE CHANGES

I. Part 2 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations is amended as follows:

a. Add a primary allocation for the Private Operational-Fixed Microwave Service in column (6) of the 3700-4200 MHz band.

b. Add a primary allocation for the Private Operational-Fixed Microwave Service in column (6) of the 5925-6425 MHz band.

c. Add a primary allocation for the Domestic Public Fixed Services in column (6) of the 6525-6875 MHz band.

d. Add a primary allocation for the Private Operational-Fixed Microwave Service in column (6) of the 10.55-10.60 GHz band.

e. Add a primary allocation for the Private Operational-Fixed Microwave Service in column (6) of the 10.60-10.68 GHz band.

f. Add a primary allocation for the Private Operational-Fixed Microwave Service in column (6) of the 10.7-11.7 GHz band.

§ 2.106 Table of Frequency Allocations

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International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
	3700-4200 FIXED. FIXED-SATELLITE (space-to-Earth). MOBILE except aeronautical mobile. 787		3700-4200	3700-4200 FIXED. FIXED-SATELLITE (space-to-Earth). NG41	DOMESTIC PUBLIC FIXED(21). SATELLITE COMMUNICATIONS (25). PRIVATE OPERATIONAL-FIXED MICROWAVE(94).	

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International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part (s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		
5925-7075	FIXED. FIXED-SATELLITE (Earth-to-space). MOBILE. 791 792A 809		5925-7125 791 809	5925-6425 FIXED. FIXED-SATELLITE (Earth-to-space). NG41	DOMESTIC PUBLIC FIXED(21). SATELLITE COMMUNICATIONS(25). PRIVATE OPERATIONAL-FIXED MICROWAVE(94).	
				6425-6525 FIXED-SATELLITE (Earth-to-space). MOBILE 791 809	AUXILIARY BROADCAST(74). CABLE TELEVISION(78). DOMESTIC PUBLIC FIXED(21). PRIVATE OPERATIONAL FIXED MICROWAVE(94).	
				6525-6875 FIXED. FIXED-SATELLITE (Earth-to-space). 792A 809	DOMESTIC PUBLIC FIXED(21). SATELLITE COMMUNICATIONS(25). PRIVATE OPERATIONAL-FIXED-MICROWAVE(94).	
*	*	*	*	*		

International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
10.55-10.60	FIXED. MOBILE except aeronautical mobile. Radiolocation.		10.55-10.60	10.55-10.60 FIXED.	DOMESTIC PUBLIC FIXED(21). PRIVATE OPERATIONAL-FIXED MICROWAVE(94).	
10.60-10.68	EARTH EXPLORATION SATELLITE (passive). FIXED. MOBILE except aeronautical mobile. RADIO ASTRONOMY. SPACE RESEARCH (passive). Radiolocation. 831 832		10.60-10.68 EARTH EXPLORATION-SATELLITE (passive). SPACE RESEARCH (passive). US265 US277	10.60-10.68 EARTH EXPLORATION-SATELLITE (passive). FIXED. SPACE RESEARCH (passive). US265 US277	DOMESTIC PUBLIC FIXED(21). PRIVATE OPERATIONAL FIXED MICROWAVE(94).	

International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*	*	
10.7-11.7 FIXED. FIXED-SATELLITE (space-to-Earth) (Earth-to-space). MOBILE except aeronautical mobile. 792A 835	10.7-11.7 FIXED. FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile. 792A		10.7-11.7 US211	10.7-11.7 FIXED. FIXED SATELLITE (space-to-Earth). 792A US211 NG41 NG104	DOMESTIC PUBLIC FIXED(21). PRIVATE OPERATIONAL-FIXED MICROWAVE(94).	
*	*	*	*	*	*	

II. Part 21 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 21 - DOMESTIC PUBLIC FIXED RADIO SERVICES

1. The authority citation in Part 21 continues to read:

AUTHORITY: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 410, 602; 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552.

2. Subpart C is amended by revising sections 21.100, 21.107, 21.108, 21.120, and 21.122 to read as follows:

Section 21.100 Frequencies.

* * * * *

(c) Frequency diversity transmission will not be authorized in these services in the absence of a factual showing that the required communications cannot practically be achieved by other means. Where frequency diversity is deemed to be justified on a protection channel basis, it shall be limited to one protection channel for the bands 3700-4200, 5925-6425, and 6525-6875 MHz, and a ratio of one protection channel for three working channels for the bands 10,550-10,680 and 10,700-11,700 MHz. In the bands 3700-4200, 5925-6425, and 6525-6875 MHz, no frequency diversity protection channel will be authorized unless there is a minimum of three working channels, except that where a substantial showing is made that a total of three working channels will be required within three years, a protection channel may be authorized simultaneously with the first working channel. A protection channel authorized under such exception will be subject to termination if applications for the third working channel are not filed within three years of the grant date of the applications for the first working channel. Where equipment employing digital modulation techniques with cross-polarized operation on the same frequency is used, the protection channel authorized under the above conditions may be considered to consist of both polarizations of the protection frequency where such is shown to be necessary.

(d)(1) * * *

(d)(2)(i)-(x) * * *

(d)(2)(xi) Interference protection criteria for fixed stations in the bands 3700-4200, 5925-6425, 6525-6875, 10,550-10,680, and 10,700-11,700 MHz are specified in Section 94.63.

(d)(2)(xii) Any frequency reserved by a licensee for future use in the bands 3700-4200, 5925-6425, 6525-6875, 10,550-10,680, and 10,700-11,700 MHz must be released for use by another licensee upon a showing by the latter that it requires an additional frequency and cannot coordinate one that is not reserved for future use.

Section 21.107 Transmitter power.

* * * * *

(b) The rated power of a transmitter employed in these radio services shall not exceed the values shown in the following tabulation:

Frequency band (MHz)	Maximum allowable transmitter power		Maximum allowable EIRP	
	Fixed (W)	Mobile (W)	Fixed (dBW)	Mobile (dBW)
512.0 to 2,110	20.0	20.0	(3)	.....
932.5 to 935.0	20.0	.....	+40	.....
941.5 to 944.0	20.0	.....	+40	.....
2,110 to 2,130	20.0	.....	.....	.....
2,150 to 2,160	(1)20.0	.....	+45	.....
2,160 to 2,180	(1)20.0	.....	.....	.....
2,500 to 2,686	(1)10.0	.....	.....	.....
2,686 to 2,690	0.25	.....	.....	.....
3,700 to 4,200	20.0	.....	+50	.....
5,925 to 6,425	20.0	.....	+55	.....
6,425 to 6,525	.....	20.0	.....	+35
6,525 to 6,875	10.0	.....	+50	.....
10,550 to 10,680	(4)10.0	.....	+50	.....
10,700 to 11,700	10.0	.....	+50	.....
12,200 to 13,250	10.0	10.0	.....	.....
17,700 to 18,600	10.0	.....	+55	.....
18,600 to 18,800	(2)10.0	.....	+35	.....
18,800 to 19,700	10.0	.....	+55	.....
21,200 to 23,600	10.0	.....	+50	.....
27,500 to 29,500	10.0	.....	+55	.....
31,000 to 31,300	0.05	0.05	.....	.....
38,600 to 40,000	10.0	1.5	+50	.....

Footnote (1) * * *

(2) The power delivered to the antenna is limited to -3 dBW.

(3) The EIRP of stations in the 932-935, 941.5-944, and 10,600-10,800 MHz bands must not exceed +40 dBW.

(4) The output power of a Digital Termination System nodal transmitter shall not exceed 0.5 watts per 250 KHz. The output power of a Digital Termination System user transmitter shall not exceed 0.04 watts per 250 KHz. The transmitter power in terms of the watts specified is the peak envelope power of the emission measured at the associated antenna input power. The operating power shall not exceed the authorized power by more than 10 percent of the authorized power in watts at any time.

* * * * *

Section 21.106 Directional antennas.

* * * * *

(c) * * *

Antenna Standards

Frequency(MHz)	Category	Maximum beam-width to 3 dB points (included angle in degrees)	Minimum antenna gain (dBi)	Minimum radiation suppression to angle in degrees from centerline of main beam in decibels						
				5° to 10°	10° to 15°	15° to 20°	20° to 30°	30° to 100°	100° to 140°	140° to 180°
932.5 to 935	A	14.0	n/a		6	11	14	17	20	24
941.5 to 944	B	20.0	n/a			6	10	13	15	20
2,500 to 4,200	A	n/a	36	23	29	33	36	42	55	55
	B	n/a	36	20	24	28	32	32	32	32
5,925 to 6,425 (5)	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	21	25	29	32	35	39	45
5,925 to 6,425 (6)	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
6,525 to 6,875 (5)	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	21	25	29	32	35	35	39
6,525 to 6,875 (6)	A	1.5	n/a	26	29	32	34	38	41	49
	B	2.0	n/a	21	25	29	32	35	39	45
10,550 to 10,680 (4)	A	n/a	38	25	29	33	36	42	55	55
(5)	B	n/a	38	20	24	28	32	35	35	39
10,550 to 10,680 (6)	A	3.4	34	20	24	28	32	35	55	55
	B	3.4	34	20	24	28	32	35	35	39
10,565 to 10,615 (7)	n/a	360	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
10,630 to 10,680 (7)	n/a	n/a	34	20	24	28	32	35	36	36
10,700 to 11,700 (5)	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
17,700 to 18,820	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
18,920 to 19,700 1	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
21,200 to 23,600	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
31,000 to 31,300 (2) (3)	n/a	4.0	38	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Above 31,300	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36

(1) Digital Termination User Station antennas in this band shall meet performance Standard B and have a minimum antenna gain of 34 dBi. The maximum beamwidth requirement does not apply to DTS User Stations. Digital Termination Nodal Stations need not comply with these standards.
(2) - (3) * * *
(4) Except for such antennas between 140° and 180° authorized or pending on January 1, 1989, in the band 10,550 to 10,565 MHz for which minimum radiation to suppression to angle (in degrees) from centerline of main beam is 36 decibels.
(5) These antenna standards apply to all point-to-point stations authorized after June 1, 1997. Existing licensees and pending applicants on that date are grandfathered and need not comply with these standards.
(6) These antenna standards apply to all point-to-point stations authorized on or before June 1, 1997.
(7) These antenna standards apply only to Digital Termination User Stations licensed, in operation, or applied for prior to July 15, 1993.

NOTE: Stations must employ an antenna that meets the performance standards for Category A, except that in areas not subject to frequency congestion, antennas meeting standards for Category B may be employed. Note, however, that the Commission may require the use of high performance antennas where interference problems can be resolved by the use of such antennas.

(d) * * *

(e) These limitations are necessary to minimize the probability of harmful interference to reception in the bands 5925-6875 on board geostationary space stations in the fixed-satellite service (Part 25).

(1) 5925 to 6875 MHz. * * *

(2) * * *

Section 21.120 Authorization of transmitters.

* * * * *

(e) After July 15, 1994, the manufacture (except for export) or importation of equipment employing digital modulation techniques in the 3700-4200, 5925-6425, 6525-6875, 10,550-10,680, and 10,700-11,700 MHz bands must meet the minimum payload capacity requirements of Section 21.122(a)(3).

Section 21.122 Microwave digital modulation.

(a) Microwave transmitters employing digital modulation techniques and operating below 15 GHz shall, with appropriate

multiplex equipment, comply with the following additional requirements:

(1) The bit rate, in bits per second, shall be equal to or greater than the bandwidth specified by the emission designator in Hertz (e.g., to be acceptable, equipment transmitting at a 20 Mb/s rate must not require a bandwidth of greater than 20 MHz), except the bandwidth used to calculate the minimum rate shall not include any authorized guard band.

(2) Equipment to be used for voice transmission placed in service, authorized, or applied for on or before June 1, 1997 in the 2110 to 2130 and 2160 to 2180 MHz bands shall be capable of satisfactory operation within the authorized bandwidth to encode at least 96 voice channels. Equipment placed in service, authorized, or applied for on or before June 1, 1997 in the 3700-4200, 5925-6425 (30 MHz bandwidth), and 10,700-11,700 MHz (30 and 40 MHz bandwidths) bands shall be capable of satisfactory operation within the authorized bandwidth to encode at least 1152 voice channels. These required loading levels may be reduced by a factor of 1/N provided that N transmitters may be operated satisfactorily, over the same radio path, within an authorized bandwidth less than, or equal to, the maximum authorizable bandwidth (e.g., the 1152 channel requirement may be reduced to 576 if two transmitters can be satisfactorily operated over the same path within the maximum bandwidth). Where type accepted equipment is designed to operate on the same frequency in a cross polarized configuration to meet the above capacity requirements, the Commission will require, at the time additional transmitters are authorized, that both polarizations of a frequency be used before a new frequency assignment is made, unless a single transmitter installation was found to be justified by the Commission at the time it authorized the first transmitter.

(3) The following capacity and loading requirements shall be met for equipment applied for, authorized, and placed in service after June 1, 1997 in the 3700-4200 MHz (4 GHz), 5925-6425 and 6525-6875 MHz (6 GHz), 10,550-10,680 MHz (10 GHz), and 10,700-11,700 MHz (11 GHz) bands:

Nominal Channel Bandwidth (MHz)	Minimum Payload Capacity (Mbits/s)	Minimum Traffic Loading Payload (as percent of payload capacity)	Typical Utilization*
0.400	1.54	n/a	1 DS-1
0.800	3.08	n/a	2 DS-1
1.25	3.08	n/a	2 DS-1
1.60	6.17	n/a	4 DS-1
2.50	6.17	n/a	4 DS-1
3.75	12.3	n/a	8 DS-1
5.0	18.5	n/a	12 DS-1
10.0	44.7	50**	1 DS-3/STS-1
20.0	89.4	50**	2 DS-3/STS-1

30.0 (11 GHz)	89.4	50**	2 DS-3/STS-1
30.0 (6 GHz)	134.1	50**	3 DS-3/STS-1
40.0	134.1	50**	3 DS-3/STS-1

* DS and STS refer to the number of voice circuits a channel can accommodate. 1 DS-1 = 24 voice circuits; 2 DS-1 = 48; 4 DS-1 = 96; 8 DS-1 = 192; 12 DS-1 = 288; 1 DS-3/STS-1 = 672; 2 DS-3/STS-1 = 1344; 3 DS-3/STS-1 = 2016.
** This loading requirement must be met within 30 months of licensing. If two transmitters simultaneously operate on the same frequency over the same path, the requirement is reduced to 25 percent.

(4) If a transmitter is authorized to operate in a bandwidth that is not listed in paragraph (a)(3) of this section, it shall meet the minimum payload capacity and traffic loading requirements of the next largest channel bandwidth listed in the table; e.g., if the authorized bandwidth is 3.5 MHz, the minimum payload capacity shall be 12.3 Mbits/s.

(5) Transmitters carrying digital motion video motion material are exempt from the requirements specified in paragraphs (a)(2) and (a)(3) of this section, provided that the minimum bit rate specified in paragraph (a)(1) is met. In the 6, 10, and 11 GHz bands, concatenation of multiple contiguous channels is permitted for channels of equal bandwidth on center frequencies, provided no other channels are available and the minimum payload capacity requirements are met.

* * * * *

3. Subpart G is amended by deleting section 21.507 and by revising sections 21.502, 21.503, and 21.506 to read as follows:

Section 21.502 Frequencies.

(a) Frequencies in the 17,700-19,700 MHz band are available for assignment for all DEMS applicants. Assignment will consist of a pair of channels as set out in paragraph (c) of this section plus internodal channels as set out in paragraph (d) of this section.

(b) Licensees may apply for an additional channel pair in an SMSA only when it is operating its previously authorized DTS at or near the expected capacity and the service to be provided will fully utilize all spectrum requested.

(c) Digital Termination Systems assignments shall be made according to the following plan, except that systems licensed, in operation, or applied for in the 10,565-10,615 and 10,630-10,680 MHz bands prior to July 15, 1993 are permitted to use frequencies in those bands if they prior coordinate with 10 GHz point-to-point licensees:

Channel No.	Nodal station frequency band (MHz)	User station frequency band (MHz)
30	18,870-18,880	19,210-19,220
31	18,880-18,890	19,220-19,230
32	18,890-18,900	19,230-19,240
33	18,900-18,910	19,240-19,250
34	18,910-18,920	19,250-19,260

These channel pairs will be assigned in each SMSA and may be subdivided as desired by the licensee.

(d) Internodal link assignments are to be made in accordance with the provisions of Subpart I of Part 21, applying to point-to-point operations.

Section 21.503 Frequency stability.

The frequency stability of each Digital Termination Nodal Station transmitter authorized for this service in the 17,700-19,700 MHz band shall be ±0.001%. The frequency stability of each Digital Termination User Station transmitter authorized for this service in this band shall be ±0.003%.

Section 21.506 Transmitter power.

The transmitter power will be governed by Section 21.107 of this rule part. Further, each application shall contain an analysis demonstrating compliance with Section 21.107(a).

4. Subpart I is amended by revising sections 21.701 and 21.710 to read as follows:

Section 21.701 Frequencies.

(a) Frequencies in the following bands are available for assignment to fixed radio stations in the Point-to-Point Microwave Radio Service.

932.5-935 MHz 17
941.5-944 MHz 17 18
2,110-2,130 MHz 1 3 7 20
2,160-2,180 MHz 1 2 20 21
3,700-4,200 MHz 8 14
5,925-6,425 MHz 6 14
6,525-6,875 MHz 14
10,550-10,680 MHz 19
10,700-11,700 MHz 8 9 19
13,200-13,250 MHz 4
17,700-18,820 MHz 5 10 15
18,920-19,160 MHz 5 10 15
19,260-19,700 MHz 5 10 15
21,200-22,000 MHz 4 11 12 13
22,000-23,600 MHz 4 11 12
27,500-29,500 MHz 5
31,000-31,300 MHz 16
38,600-40,000 MHz 4

Footnotes 1-13 * * *

14 Frequencies in this band are shared with stations in the fixed-satellite and private-operational fixed microwave services.

Footnotes 15-18 * * *

19 Frequencies in this band are shared with stations in the private-operational fixed microwave service.

20 New facilities in these bands will be licensed only on a secondary basis. Facilities licensed or applied before January 16, 1992, are permitted to make modifications and minor extensions and retain their primary status.

21 Any authorization of additional stations to use the 2160-2162 MHz band for Multipoint Distribution Service applied for after January 16, 1992 shall be secondary to use of the band for emerging technology services.

(b) * * *

(c) * * *

(d) 3,700 to 4,200 MHz. 20 MHz maximum authorized bandwidth.

20 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)	
3710	3990	
3730	4010	
3750	3950	
3770	3970	
3790	4070	
3810	4090	
3830	4030	
3850	4050	
3870	4150	
3890	4170	
3910	4110	
3930	4130	
n/a	4190	1

1 This frequency may be assigned for unpaired use.

(e) 5.925 to 6.425 MHz. 30 MHz authorized bandwidth.

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5925.225	6177.100

5925.625	.....	6177.500
5926.050	.....	6177.925
5926.450	.....	6178.325
5926.875	.....	6178.750
5927.275	.....	6179.150
5927.725	.....	6179.600
5928.125	.....	6180.000
5928.550	.....	6180.425
5928.950	.....	6180.825
5929.375	.....	6181.250
5929.775	.....	6181.650
6168.350	.....	6420.225
6168.750	.....	6420.625
6169.175	.....	6421.050
6169.575	.....	6421.450
6170.000	.....	6421.875
6170.400	.....	6422.275
6170.850	.....	6422.725
6171.250	.....	6423.125
6171.675	.....	6423.550
6172.075	.....	6423.950
6172.500	.....	6424.375
6172.900	.....	6424.775

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
5925.425	.....	6177.300
5926.250	.....	6178.125
5927.075	.....	6178.950
5927.925	.....	6179.800
5928.750	.....	6180.625
5929.575	.....	6181.450
6168.550	.....	6420.425
6169.375	.....	6421.250
6170.200	.....	6422.075
6171.050	.....	6422.925
6171.875	.....	6423.750
6172.700	.....	6424.575

(3) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
5925.625	.....	6177.500
5926.875	.....	6178.750
5928.125	.....	6180.000

5929.375		.....	6181.250
6108.893		.....	6360.933
6110.128		.....	6362.168
6111.364		.....	6363.404
6112.599		.....	6364.639
6113.834		.....	6365.874
6115.070		.....	6367.110
6116.305		.....	6368.345
6117.541		.....	6369.581
6118.776		.....	6370.816
6120.011		.....	6372.051
6121.247		.....	6373.287
6122.482		.....	6374.522
6123.718		.....	6375.758
6124.953		.....	6376.993
6126.189		.....	6378.229
6127.424		.....	6379.464
6128.659		.....	6380.699
6129.895		.....	6381.935
6131.130		.....	6383.170
6132.366		.....	6384.406
6133.601		.....	6385.641
6134.836		.....	6386.876
6136.072		.....	6388.112
6137.307		.....	6389.347
6138.543		.....	6390.583
6139.778		.....	6391.818
6141.014		.....	6393.054
6142.249		.....	6394.289
6143.484		.....	6395.524
6144.720		.....	6396.760
6145.955		.....	6397.995
6147.191		.....	6399.231
6148.426		.....	6400.466
6149.661		.....	6401.701
6150.897		.....	6402.937
6152.132		.....	6404.172
6153.368		.....	6405.408
6154.603		.....	6406.643
6155.839		.....	6407.879
6157.074		.....	6409.114
6158.309		.....	6410.349
6159.545		.....	6411.585
6160.780		.....	6412.820
6162.016		.....	6414.056
6163.251		.....	6415.291
6164.486		.....	6416.526
6165.722		.....	6417.762
6166.957		.....	6418.997
6168.750		.....	6420.625
6170.000		.....	6421.875
6171.250		.....	6423.125
6172.500		.....	6424.375
6173.750	1	.....	n/a

6175.000	1	.....	n/a
6176.250	1	.....	n/a

1 - These frequencies may be assigned for unpaired use.

(4) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)			Receive (transmit) (MHz)
5926.250		.....	6178.125
5928.750		.....	6180.625
6109.510		.....	6361.550
6111.981		.....	6364.021
6114.452		.....	6366.492
6116.923		.....	6368.963
6119.394		.....	6371.434
6121.865		.....	6373.905
6124.335		.....	6376.375
6126.806		.....	6378.846
6129.277		.....	6381.317
6131.748		.....	6383.788
6134.219		.....	6386.259
6136.690		.....	6388.730
6139.160		.....	6391.200
6141.631		.....	6393.671
6144.102		.....	6396.142
6146.573		.....	6398.613
6149.044		.....	6401.084
6151.515		.....	6403.555
6153.985		.....	6406.025
6156.456		.....	6408.496
6158.927		.....	6410.967
6161.398		.....	6413.438
6163.869		.....	6415.909
6166.340		.....	6418.380
6169.375		.....	6421.250
6171.875		.....	6423.750
6175.625	1	.....	n/a

1 - This frequency may be assigned for unpaired use.

(5) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)			Receive (transmit) (MHz)
6111.364		.....	6363.404
6116.305		.....	6368.345
6121.247		.....	6373.287

6126.189	.....	6378.229
6131.130	.....	6383.170
6136.072	.....	6388.112
6141.014	.....	6393.054
6145.955	.....	6397.995
6150.897	.....	6402.937
6155.839	.....	6407.879
6160.780	.....	6412.820
6165.722	.....	6417.762
6175.000 1	.....	n/a

1 - This frequency may be assigned for unpaired use.

(6) 5 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
6110.75	.....	6362.79
6115.69	.....	6367.73
6120.63	.....	6372.67
6125.57	.....	6377.61
6130.51	.....	6382.55
6135.45	.....	6387.49
6140.40	.....	6392.44
6145.34	.....	6397.38
6150.28	.....	6402.32
6155.22	.....	6407.26
6160.16	.....	6412.20
6165.10	.....	6417.14

(7) 10 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
5935.32	.....	6187.36
5945.20	.....	6197.24
5955.08	.....	6207.12
5964.97	.....	6217.01
5974.85	.....	6226.89
5984.73	.....	6236.77
5994.62	.....	6246.66
6004.50	.....	6256.54
6014.38	.....	6266.42
6024.27	.....	6276.31
6034.15	.....	6286.19
6044.03	.....	6296.07
6053.92	.....	6305.96
6063.80	.....	6315.84

6073.68		.....	6325.72	
6083.57		.....	6335.61	
6093.45		.....	6345.49	
6103.33		.....	6355.37	
6113.22	1	.....	6365.26	1
6123.10	1	.....	6375.14	1
6132.98	1	.....	6385.02	1
6142.87	1	.....	6394.91	1
6152.75	1	.....	6404.79	1
6162.63	1	.....	6414.67	1

1 - Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(8) 30 MHz bandwidth channels:

Transmit (receive) (MHz)			Receive (transmit) (MHz)	
5945.20		.....	6197.24	
5974.85		.....	6226.89	
6004.50		.....	6256.54	
6034.15		.....	6286.19	
6063.80		.....	6315.84	
6093.45		.....	6345.49	
6123.10	1	.....	6375.14	1
6152.75	1	.....	6404.79	1

1 - Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(f) 6,525 to 6,875 MHz. 10 MHz authorized bandwidth.

(1) 400 kHz bandwidth channels

Transmit (receive) (MHz)		Receive (transmit) (MHz)
6525.225	.....	6870.225
6525.625	.....	6870.625
6526.050	.....	6871.050
6526.450	.....	6871.450
6526.875	.....	6871.875
6527.275	.....	6872.275
6527.725	.....	6872.725
6528.125	.....	6873.125
6528.550	.....	6873.550
6528.950	.....	6873.950

6529.375		.....	6874.375	
6529.775		.....	6874.775	

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)			Receive (transmit) (MHz)	
6525.425		.....	6870.425	
6526.250		.....	6871.250	
6527.075		.....	6872.075	
6527.925		.....	6872.925	
6528.750		.....	6873.750	
6529.575		.....	6874.575	

(3) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)			Receive (transmit) (MHz)	
6525.625		.....	6870.625	
6526.875		.....	6871.875	
6528.125		.....	6873.125	
6529.375		.....	6874.375	
6540.625	1	.....	6718.125	1
6541.875	1	.....	6719.375	1
6543.125	1	.....	6713.125	1
6544.375	1	.....	6714.375	1
6545.625	1	.....	6715.625	1
6546.875	1	.....	6716.875	1
6548.125		.....	6728.125	
6549.375		.....	6729.375	
6550.625		.....	6730.625	
6551.875		.....	6731.875	
6553.125	1	.....	6723.125	1
6554.375	1	.....	6724.375	1
6555.625	1	.....	6725.625	1
6556.875	1	.....	6726.875	1
6558.125		.....	6738.125	
6559.375		.....	6739.375	
6560.625		.....	6740.625	
6561.875		.....	6741.875	
6563.125		.....	6733.125	
6564.375		.....	6734.375	
6565.625		.....	6735.625	
6566.875		.....	6736.875	
6568.125	1	.....	6720.625	1
6569.375	1	.....	6721.875	1
6580.625	1	.....	6868.125	1
6581.875	1	.....	6869.375	1

6583.125 ..... 6743.125
6584.375 ..... 6744.375
6585.625 ..... 6745.625
6586.875 ..... 6746.875
6588.125 ..... 6748.125
6589.375 ..... 6749.375
6590.625 ..... 6750.625
6591.875 ..... 6751.875
6593.125 ..... 6753.125
6594.375 ..... 6754.375
6595.625 ..... 6755.625
6596.875 ..... 6756.875
6598.125 ..... 6758.125
6599.375 ..... 6759.375
6600.625 ..... 6760.625
6601.875 ..... 6761.875
6603.125 ..... 6763.125
6604.375 ..... 6764.375
6605.625 ..... 6765.625
6606.875 ..... 6766.875
6608.125 ..... 6768.125
6609.375 ..... 6769.375
6610.625 ..... 6770.625
6611.875 ..... 6771.875
6613.125 ..... 6773.125
6614.375 ..... 6774.375
6615.625 ..... 6775.625
6616.875 ..... 6776.875
6618.125 ..... 6778.125
6619.375 ..... 6779.375
6620.625 ..... 6780.625
6621.875 ..... 6781.875
6623.125 ..... 6783.125
6624.375 ..... 6784.375
6625.625 ..... 6785.625
6626.875 ..... 6786.875
6628.125 ..... 6788.125
6629.375 ..... 6789.375
6630.625 ..... 6790.625
6631.875 ..... 6791.875
6633.125 ..... 6793.125
6634.375 ..... 6794.375
6635.625 ..... 6795.625
6636.875 ..... 6796.875
6638.125 ..... 6798.125
6639.375 ..... 6799.375
6640.625 ..... 6800.625
6641.875 ..... 6801.875
6643.125 ..... 6803.125
6644.375 ..... 6804.375
6645.625 ..... 6805.625
6646.875 ..... 6806.875
6648.125 ..... 6808.125
6649.375 ..... 6809.375

6650.625		.....	6810.625	
6651.875		.....	6811.875	
6653.125		.....	6813.125	
6654.375		.....	6814.375	
6655.625		.....	6815.625	
6656.875		.....	6816.875	
6658.125		.....	6818.125	
6659.375		.....	6819.375	
6660.625		.....	6820.625	
6661.875		.....	6821.875	
6663.125		.....	6823.125	
6664.375		.....	6824.375	
6665.625		.....	6825.625	
6666.875		.....	6826.875	
6668.125		.....	6828.125	
6669.375		.....	6829.375	
6670.625		.....	6830.625	
6671.875		.....	6831.875	
6673.125		.....	6833.125	
6674.375		.....	6834.375	
6675.625		.....	6835.625	
6676.875		.....	6836.875	
6678.125		.....	6838.125	
6679.375		.....	6839.375	
6680.625		.....	6840.625	
6681.875		.....	6841.875	
6683.125		.....	6843.125	
6684.375		.....	6844.375	
6685.625		.....	6845.625	
6686.875		.....	6846.875	
6688.125		.....	6848.125	
6689.375		.....	6849.375	
6690.625		.....	6850.625	
6691.875		.....	6851.875	
6693.125		.....	6853.125	
6694.375		.....	6854.375	
6695.625		.....	6855.625	
6696.875		.....	6856.875	
6698.125		.....	6858.125	
6699.375		.....	6859.375	
6700.625		.....	6860.625	
6701.875		.....	6861.875	
6703.125		.....	6863.125	
6704.375		.....	6864.375	
6705.625		.....	6865.625	
6706.875		.....	6866.875	
6708.125	1	.....	6710.625	1
6709.375	1	.....	6711.875	1

1 - These frequencies may be assigned for unpaired use.

(4) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)	
6526.25		6871.25	
6528.75		6873.75	
6541.25	1	6718.75	1
6543.75	1	6713.75	1
6546.25	1	6716.25	1
6548.75		6728.75	
6551.25		6731.25	
6553.75	1	6723.75	1
6556.25	1	6726.25	1
6558.75		6738.75	
6561.25		6741.25	
6563.75		6733.75	
6566.25		6736.25	
6568.75	1	6721.25	1
6581.25	1	6868.75	1
6583.75		6743.75	
6586.25		6746.25	
6588.75		6748.75	
6591.25		6751.25	
6593.75		6753.75	
6596.25		6756.25	
6598.75		6758.75	
6601.25		6761.25	
6603.75		6763.75	
6606.25		6766.25	
6608.75		6768.75	
6611.25		6771.25	
6613.75		6773.75	
6616.25		6776.25	
6618.75		6778.75	
6621.25		6781.25	
6623.75		6783.75	
6626.25		6786.25	
6628.75		6788.75	
6631.25		6791.25	
6633.75		6793.75	
6636.25		6796.25	
6638.75		6798.75	
6641.25		6801.25	
6643.75		6803.75	
6646.25		6806.25	
6648.75		6808.75	
6651.25		6811.25	
6653.75		6813.75	
6656.25		6816.25	
6658.75		6818.75	
6661.25		6821.25	

6663.75		.....	6823.75	
6666.25		.....	6826.25	
6668.75		.....	6828.75	
6671.25		.....	6831.25	
6673.75		.....	6833.75	
6676.25		.....	6836.25	
6678.75		.....	6838.75	
6681.25		.....	6841.25	
6683.75		.....	6843.75	
6686.25		.....	6846.25	
6688.75		.....	6848.75	
6691.25		.....	6851.25	
6693.75		.....	6853.75	
6696.25		.....	6856.25	
6698.75		.....	6858.75	
6701.25		.....	6861.25	
6703.75		.....	6863.75	
6706.25		.....	6866.25	
6708.75	1	.....	6711.25	1

1 - These frequencies may be assigned for unpaired use.

(5) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)			Receive (transmit) (MHz)	
6545.625	1	.....	6715.625	1
6550.625		.....	6730.625	
6555.625	1	.....	6725.625	1
6560.625		.....	6740.625	
6565.625		.....	6735.625	
6585.625		.....	6745.625	
6590.625		.....	6750.625	
6595.625		.....	6755.625	
6600.625		.....	6760.625	
6605.625		.....	6765.625	
6610.625		.....	6770.625	
6615.625		.....	6775.625	
6620.625		.....	6780.625	
6625.625		.....	6785.625	
6630.625		.....	6790.625	
6635.625		.....	6795.625	
6640.625		.....	6800.625	
6645.625		.....	6805.625	
6650.625		.....	6810.625	
6655.625		.....	6815.625	
6660.625		.....	6820.625	
6665.625		.....	6825.625	
6670.625		.....	6830.625	
6675.625		.....	6835.625	
6680.625		.....	6840.625	

6685.625		.....	6845.625	
6690.625		.....	6850.625	
6695.625		.....	6855.625	
6700.625		.....	6860.625	
6705.625		.....	6865.625	
6710.625	1	.....	6720.625	1

1 - These frequencies may be assigned for unpaired use.

(6) 5 MHz bandwidth channels:

Transmit (receive) (MHz)			Receive (transmit) (MHz)	
6545	1	.....	6715	1
6550		.....	6730	
6555	1	.....	6725	1
6560		.....	6740	
6565		.....	6735	
6585		.....	6745	
6590		.....	6750	
6595		.....	6755	
6600		.....	6760	
6605		.....	6765	
6610		.....	6770	
6615		.....	6775	
6620		.....	6780	
6625		.....	6785	
6630		.....	6790	
6635		.....	6795	
6640		.....	6800	
6645		.....	6805	
6650		.....	6810	
6655		.....	6815	
6660		.....	6820	
6665		.....	6825	
6670		.....	6830	
6675		.....	6835	
6680		.....	6840	
6685		.....	6845	
6690		.....	6850	
6695		.....	6855	
6700		.....	6860	
6705		.....	6865	
6710	1	.....	6720	1

1 - These frequencies may be assigned for unpaired use.

(7) 10 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)	
6545	1	6715	1
6555	1	6725	1
6565		6735	
6585		6745	
6595		6755	
6605		6765	
6615		6775	
6625		6785	
6635		6795	
6645		6805	
6655		6815	
6665		6825	
6675		6835	
6685		6845	
6695		6855	
6705		6865	
6535	2	6575	2

1 - These frequencies may be assigned for unpaired use.
2 - Available only for emergency restoration, maintenance bypass, or other temporary-fixed purposes. Such uses are authorized on a non-interference basis to other frequencies in this band. Interference analysis required by Section 94.63 does not apply to this frequency pair.

(g) 10,550 to 10,680 MHz. 5 MHz authorized bandwidth.

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10605.225	10670.225
10605.625	10670.625
10606.050	10671.050
10606.450	10671.450
10606.875	10671.875
10607.275	10672.275
10607.725	10672.725
10608.125	10673.125
10608.550	10673.550
10608.950	10673.950
10609.375	10674.375
10609.775	10674.775
10610.225	10675.225
10610.625	10675.625
10611.050	10676.050

10611.450	10676.450
10611.875	10676.875
10612.275	10677.275
10612.725	10677.725
10613.125	10678.125
10613.550	10678.550
10613.950	10678.950
10614.375	10679.375
10614.775	10679.775

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10605.425	10670.425
10606.250	10671.250
10607.075	10672.075
10607.925	10672.925
10608.750	10673.750
10609.575	10674.575
10610.425	10675.425
10611.250	10676.250
10612.075	10677.075
10612.925	10677.925
10613.750	10678.750
10614.575	10679.575

(3) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)	
10550.625		10615.625	
10551.875		10616.875	
10553.125		10618.125	
10554.375		10619.375	
10555.625		10620.625	
10556.875		10621.875	
10558.125		10623.125	
10559.375		10624.375	
10560.625	1	10625.625	1
10561.875	1	10626.875	1
10563.125	1	10628.125	1
10564.375	1	10629.375	1
10565.625		10630.625	
10566.875		10631.875	
10568.125		10633.125	
10569.375		10634.375	

10570.625	10635.625
10571.875	10636.875
10573.125	10638.125
10574.375	10639.375
10575.625	10640.625
10576.875	10641.875
10578.125	10643.125
10579.375	10644.375
10580.625	10645.625
10581.875	10646.875
10583.125	10648.125
10584.375	10649.375
10585.625	10650.625
10586.875	10651.875
10588.125	10653.125
10589.375	10654.375
10590.625	10655.625
10591.875	10656.875
10593.125	10658.125
10594.375	10659.375
10595.625	10660.625
10596.875	10661.875
10598.125	10663.125
10599.375	10664.375
10600.625	10665.625
10601.875	10666.875
10603.125	10668.125
10604.375	10669.375
10605.625	10670.625
10606.875	10671.875
10608.125	10673.125
10609.375	10674.375
10610.625	10675.625
10611.875	10676.875
10613.125	10678.125
10614.375	10679.375

1 These frequencies are also available for DTS stations licensed, in operation, or applied for prior to July 15, 1993.

(4) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10551.25 1	10616.25 1
10553.75 1	10618.75 1
10556.25 1	10621.25 1
10558.75 1	10623.75 1
10561.25	10626.25
10563.75	10628.75
10566.25	10631.25
10568.75	10633.75

10571.25	.....	10636.25	
10573.75	.....	10638.75	
10576.25	.....	10641.25	
10578.75	.....	10643.75	
10581.25	.....	10646.25	
10583.75	.....	10648.75	
10586.25	1.....	10651.25	1
10588.75	1.....	10653.75	1
10591.25	1.....	10656.25	1
10593.75	1.....	10658.75	1
10596.25	1.....	10661.25	1
10598.75	1.....	10663.75	1
10601.25	1.....	10666.25	1
10603.75	1.....	10668.75	1
10606.25	1.....	10671.25	1
10608.75	1.....	10673.75	1
10611.25	1.....	10676.25	1
10613.75	1.....	10678.75	1

1 These frequencies are also available for DTS stations licensed, in operation, or applied for prior to July 15, 1993.

(5) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
10553.125	.....	10618.125
10558.125	.....	10623.125
10563.125	.....	10628.125
10568.125	.....	10633.125
10573.125	.....	10638.125
10578.125	.....	10643.125
10583.125	.....	10648.125
10588.125	.....	10653.125
10593.125	.....	10658.125
10598.125	.....	10663.125
10603.125	.....	10668.125

(6) 5 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)	
10552.5	.....	10617.5	
10557.5	.....	10622.5	
10562.5	.....	10627.5	
10567.5	1.....	10632.5	1
10572.5	1.....	10637.5	1
10577.5	1.....	10642.5	1
10582.5	1.....	10647.5	1

10587.5	10652.5
10592.5	10657.5
10597.5	10662.5
10602.5	10667.5

1 These frequencies are also available for DTS stations licensed, in operation, or applied for prior to July 15, 1993.

(h) 10,700 to 11,700 MHz. 40 MHz authorized bandwidth.

(1) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
11130.625	11620.625
11131.875	11621.875
11133.125	11623.125
11134.375	11624.375
11135.625	11625.625
11136.875	11626.875
11138.125	11628.125
11139.375	11629.375
11140.625	11630.625
11141.875	11631.875
11143.125	11633.125
11144.375	11634.375
11145.625	11635.625
11146.875	11636.875
11148.125	11638.125
11149.375	11639.375
11150.625	11640.625
11151.875	11641.875
11153.125	11643.125
11154.375	11644.375
11155.625	11645.625
11156.875	11646.875
11158.125	11648.125
11159.375	11649.375
11160.625	11650.625
11161.875	11651.875
11163.125	11653.125
11164.375	11654.375
11165.625	11655.625
11166.875	11656.875
11168.125	11658 125
11169.375	11659.375
11170.625	11660.625
11171.875	11661.875
11173.125	11663.125
11174.375	11664.375
11175.625	11665.625
11176.875	11666.875

11178.125	11668.125
11179.375	11669.375
11180.625	11680.625
11181.875	11681.875
11183.125	11683.125
11184.375	11684.375
11185.625	11685.625
11186.875	11686.875
11188.125	11688.125
11189.375	11689.375
11190.625	11690.625
11191.875	11691.875
11193.125	11693.125
11194.375	11694.375
11195.625	11695.625
11196.875	11696.875
11198.125	11698.125
11199.375	11699.375

(2) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
11131.25	11621.25
11133.75	11623.75
11136.25	11626.25
11138.75	11628.75
11141.25	11631.25
11143.75	11633.75
11146.25	11636.25
11148.75	11638.75
11151.25	11641.25
11153.75	11643.75
11156.25	11646.25
11158.75	11648.75
11161.25	11651.25
11163.75	11653.75
11166.25	11656.25
11168.75	11658.75
11171.25	11661.25
11173.75	11663.75
11176.25	11666.25
11178.75	11668.75
11181.25	11681.25
11183.75	11683.75
11186.25	11686.25
11188.75	11688.75
11191.25	11691.25
11193.75	11693.75
11196.25	11696.25
11198.75	11698.75

(3) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
11133.125	11623.125
11138.125	11628.125
11143.125	11633.125
11148.125	11638.125
11153.125	11643.125
11158.125	11648.125
11163.125	11653.125
11168.125	11658.125
11173.125	11663.125
11178.125	11668.125
11183.125	11683.125
11188.125	11688.125
11193.125	11693.125
11198.125	11698.125

(4) 5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
11132.5	11622.5
11137.5	11627.5
11142.5	11632.5
11147.5	11637.5
11152.5	11642.5
11157.5	11647.5
11162.5	11652.5
11167.5	11657.5
11172.5	11662.5
11177.5	11667.5
11182.5	11682.5
11187.5	11687.5
11192.5	11692.5
11197.5	11697.5

(5) 10 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10705	11205
10715	11215
10725 2	11675 1

10735		.....	11225	
10745		.....	11235	
10755		.....	11245	
10765		.....	11255	
10775		.....	11265	
10785		.....	11275	
10795		.....	11285	
10805		.....	11295	
10815		.....	11305	
10825		.....	11315	
10835		.....	11325	
10845		.....	11335	
10855		.....	11345	
10865		.....	11355	
10875		.....	11365	
10885		.....	11375	
10895		.....	11385	
10905		.....	11395	
10915		.....	11405	
10925		.....	11415	
10935		.....	11425	
10945		.....	11435	
10955		.....	11445	
10965		.....	11455	
10975		.....	11465	
10985		.....	11475	
10995		.....	11485	
11005		.....	11495	
11015		.....	11505	
11025		.....	11515	
11035		.....	11525	
11045		.....	11535	
11055		.....	11545	
11065		.....	11555	
11075		.....	11565	
11085		.....	11575	
11095		.....	11585	
11105		.....	11595	
11115		.....	11605	
11125		.....	11615	
11135	1	.....	11625	2
11145	1	.....	11635	1
11155	1	.....	11645	1
11165	1	.....	11655	1
11175	1	.....	11665	1
11185	1	.....	11685	1
11195	1	.....	11695	1

1 Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

2 These frequencies may be assigned for unpaired use.

(6) 30 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)	
10715		11215	
10755		11245	
10795		11285	
10835		11325	
10875		11365	
10915		11405	
10955		11445	
10995		11485	
11035		11525	
11075		11565	
11115		11605	
11155	1	11645	1
11185	1	11685	1

1 Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(7) 40 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)	
10735		11225	
10775		11265	
10815		11305	
10855		11345	
10895		11385	
10935		11425	
10975		11465	
11015		11505	
11055		11545	
11095		11585	
11135	1	11625	1
11175	1	11665	1

1 Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(i) * * * (formerly (e))

(j) * * * (formerly (f))

(k) * * * (formerly (g))

(l) Fixed systems licensed, in operation, or applied for in the 5925-6425, 10,550-10,680, and 10,700-11,700 MHz bands prior to July 15, 1993 are permitted to use channel plans in effect prior to that date, including adding channels under those plans.

Section 21.710 Limitations on path lengths and channel loading.

(a) The distance between end points of a fixed link must equal or exceed the value set forth in the table below or the EIRP must be reduced in accordance with the equation set forth below.

Frequency Band (MHz)	Minimum path length (km)
Below 1,850	n/a
1,850 to 7,125	17
10,550 to 13,250	5
Above 17,700	n/a

(b) For paths shorter than those specified in the Table, the EIRP shall not exceed the value derived from the following equation.

EIRP = 30 - 20 log[A/B], dBW

Where:

EIRP = Equivalent isotropic radiated power in dBW.
A = Minimum path length from the Table for the frequency band in kilometers.
B= The actual path length in kilometers.

NOTE: Automatic transmit power control may be used to meet this requirement up to a 3 dB increase in EIRP.

(c) Upon an appropriate technical showing, applicants and licensees unable to meet the minimum path length requirement may be granted an exception to these requirements.

(d) Except for video transmission, an application for an initial working channel for a given route will not be accepted for filing where the anticipated loading (within 30 months for data and five years for voice, or other period subject to reasonable projection) is less than the minimum specified for the following frequency bands. Absent extraordinary circumstances, applications proposing additional frequencies over existing routes will not be granted unless it is shown that the traffic load will shortly exhaust the capacity of the existing equipment. For the 3700-4200 MHz band, all persons intending to utilize baseband frequencies above 7.3 MHz, or to operate with more than 1500 equivalent 4 kHz voice channels per radio channel, must submit evidence of coordination pursuant to section 21.100(d). Where no construction of radio facilities is requested, licensees must submit this evidence with their filing of any necessary

authority required pursuant to section 214 of the Communications Act and Part 63 of this chapter.

Frequency band (MHz)	Minimum number of voice channels (4 kHz or equivalent)	Minimum original data loading (Mb/s)
3700 to 4200 (20 MHz bandwidth)	900*	44.7
5925 to 6425 (10 MHz bandwidth)		22.3
5925 to 6425 (20 MHz bandwidth)		44.7
5925 to 6425 (30 MHz bandwidth)	900*	67.0
10,700 to 11,700 (10 MHz bandwidth)	240	22.3
10,700 to 11,700 (20 MHz bandwidth)	240	44.7
10,700 to 11,700 (30 MHz bandwidth)	900*	44.7
10,700 to 11,700 (40 MHz bandwidth)	900*	67.0

* Where transmitters employing digital modulation techniques are designed to be used so that two may simultaneously operate on the same frequency over the same path, the minimum number of voice channels is reduced to 500 per transmitter.

III. Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 22 - PUBLIC MOBILE SERVICE

1. The authority citation in Part 22 continues to read:

AUTHORITY: 47 U.S.C. 154, 303, unless otherwise noted.

2. Subpart G is amended by revising section 22.501 to read as follows:

Section 22.501 Frequencies.

* * * * *

(e) On a shared basis with fixed stations in the Point-to-Point Microwave Radio Service, frequencies in the bands 2110-2130 MHz and 2160-2180 MHz may be authorized for use by control and repeater stations functioning in conjunction with the Public Land Mobile Service. The emission bandwidth shall be limited to the minimum necessary to serve the purpose required, including the applicant's future growth plans. No new assignments will be made

in the 2160-2162 MHz band for stations located within 50 miles of the coordinates of the sites listed in section 21.901(c), except upon a showing that no alternative frequencies are available. Channel bandwidth in excess of 800 kHz will not be authorized. In each of these bands, the highest frequency that would not cause harmful interference to any other stations shall be assigned. Licensees in the 2110-2130 MHz and 2160-2180 MHz bands that may be required to relocate to other bands by emerging technology service providers are eligible for licensing under Part 21 in the 3700-4200, 5925-6425, 6525-6875, 10,550-10,680, and 10,700-11,700 MHz bands.

* * * * *

IV. Part 94 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 94 - PRIVATE OPERATIONAL-FIXED MICROWAVE SERVICE

1. The authority citation in Part 94 continues to read:

AUTHORITY: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. Subpart B is amended by revising section 94.45 to read as follows:

Section 94.45 Changes in authorized station requiring modification.

(a) * * *

(10) Any increase in authorized effective isotropic radiated power in excess of 3 dB (a 2-to-1 ratio);

* * * * *

3. Subpart C is amended by revising sections 94.61, 94.63, 94.65, 94.71, 94.73, 94.75, 94.77, 94.79, 94.81, and 94.94 to read as follows:

Section 94.61 Applicability.

* * * * *

(b) Frequencies in the following bands are available for assignment to stations in the Private Operational-Fixed Microwave Service:

Frequency Band (MHz)	
928 to 929	(19) and (20).
932 to 932.5	(32).
932.5 to 935	(33).

941 to 941.5.....(32).
941.5 to 944.....(33) and (34).
952 to 960.....(1) and (20).
1850 to 1990.....(2) and (35).
2130 to 2150.....(2) (21) and (35).
2150 to 2160.....(3).
2180 to 2200.....(2) (21) and (35).
2450 to 2500.....(4) and (21).
2650 to 2690.....(5).
3700 to 4200.....(8) (10) and (21).
5925 to 6425.....(6) (10) and (21).
6425 to 6525.....(6) (30) and (31).
6525 to 6575.....(6) (10) (21) and (28).
6575 to 6625.....(2) (6) (10) (21) and (28).
6625 to 6875.....(2) (6) (10) (21) and (28).
10,550 to 10,680.....(10) and (21).
10,700 to 11,700.....(8) (10) and (21).
12,200 to 12,500.....(2) (21) and (25).
12,500 to 12,700.....(2) (6) (21) and (25).
12,700 to 13,200.....(6) and (26).
13,200 to 13,250.....(6) (9) (14) and (21).
17,700 to 18,142.....(6) (8) (10) (21) and (27).
18,142 to 18,580.....(6) (8) (10) (23) and (27).
18,580 to 18,820.....(10) (17) and (21).
18,820 to 18,920.....(21) and (24).
18,920 to 19,160.....(10) (17) and (21).
19,160 to 19,260.....(21) and (24).
19,260 to 19,700.....(10) (21) and (27).
21,200 to 22,000.....(10) (11) (12) (13) and (23).
22,000 to 23,600.....(10) (12) (13) and (23).
31,000 to 31,300.....(23) and (29).
38,600 to 40,000.....(9) (18) and (23).
Bands above 40,000.....(16) and (23).

Footnotes 1-34 * * *

35 New facilities in these bands will be licensed only on a secondary basis. Facilities licensed or applied for before January 16, 1992, are permitted to make modifications and minor extensions and retain their primary status.

* * * * *

Section 94.63 Interference protection criteria for operational fixed stations.

(a) Before filing an application for new or modified facilities under this part, the applicant must perform a frequency engineering analysis to assure that the proposed facilities will not cause interference to existing or previously applied-for stations in this service of a magnitude greater than that specified in the criteria set forth in paragraph (b) of this section, unless otherwise agreed to in accordance with 94.15(b). As an exception to the above requirement, when the proposed

facilities are to be operated in the bands 932-935, 941-944, 3700-4200, 5925-6425, 6525-6875, 10,550-10,680, 10,700-11,700, 17,700-19,700, 21,200-21,800, 22,400-23,000, or 38,600-40,000 MHz applicants shall follow the prior coordination procedure specified in Section 21.100(d) of this chapter. In addition, when the proposed facilities are to be operated in the bands 12,500-12,700 MHz, applications shall also follow the procedures in Section 21.706(c) and (d) and the technical standards and requirements of part 25 of this chapter as regards licensees in the Satellite Communications Service. See also Section 94.77.

* * * * *

Section 94.65 Frequencies.

* * * * *

(g) 3,700 to 4,200 MHz. 20 MHz maximum authorized bandwidth.

20 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
3710	3990
3730	4010
3750	3950
3770	3970
3790	4070
3810	4090
3830	4030
3850	4050
3870	4150
3890	4170
3910	4110
3930	4130
n/a	4190 1

1 This frequency may be assigned for unpaired use.

(h) 5,925 to 6,425 MHz. 30 MHz authorized bandwidth.

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5925.225	6177.100
5925.625	6177.500
5926.050	6177.925
5926.450	6178.325

5926.875	6178.750
5927.275	6179.150
5927.725	6179.600
5928.125	6180.000
5928.550	6180.425
5928.950	6180.825
5929.375	6181.250
5929.775	6181.650
6168.350	6420.225
6168.750	6420.625
6169.175	6421.050
6169.575	6421.450
6170.000	6421.875
6170.400	6422.275
6170.850	6422.725
6171.250	6423.125
6171.675	6423.550
6172.075	6423.950
6172.500	6424.375
6172.900	6424.775

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5925.425	6177.300
5926.250	6178.125
5927.075	6178.950
5927.925	6179.800
5928.750	6180.625
5929.575	6181.450
6168.550	6420.425
6169.375	6421.250
6170.200	6422.075
6171.050	6422.925
6171.875	6423.750
6172.700	6424.575

(3) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5925.625	6177.500
5926.875	6178.750
5928.125	6180.000
5929.375	6181.250
6108.893	6360.933
6110.128	6362.168

6111.364		.....	6363.404
6112.599		.....	6364.639
6113.834		.....	6365.874
6115.070		.....	6367.110
6116.305		.....	6368.345
6117.541		.....	6369.581
6118.776		.....	6370.816
6120.011		.....	6372.051
6121.247		.....	6373.287
6122.482		.....	6374.522
6123.718		.....	6375.758
6124.953		.....	6376.993
6126.189		.....	6378.229
6127.424		.....	6379.464
6128.659		.....	6380.699
6129.895		.....	6381.935
6131.130		.....	6383.170
6132.366		.....	6384.406
6133.601		.....	6385.641
6134.836		.....	6386.876
6136.072		.....	6388.112
6137.307		.....	6389.347
6138.543		.....	6390.583
6139.778		.....	6391.818
6141.014		.....	6393.054
6142.249		.....	6394.289
6143.484		.....	6395.524
6144.720		.....	6396.760
6145.955		.....	6397.995
6147.191		.....	6399.231
6148.426		.....	6400.466
6149.661		.....	6401.701
6150.897		.....	6402.937
6152.132		.....	6404.172
6153.368		.....	6405.408
6154.603		.....	6406.643
6155.839		.....	6407.879
6157.074		.....	6409.114
6158.309		.....	6410.349
6159.545		.....	6411.585
6160.780		.....	6412.820
6162.016		.....	6414.056
6163.251		.....	6415.291
6164.486		.....	6416.526
6165.722		.....	6417.762
6166.957		.....	6418.997
6168.750		.....	6420.625
6170.000		.....	6421.875
6171.250		.....	6423.125
6172.500		.....	6424.375
6173.750	1	.....	n/a
6175.000	1	.....	n/a
6176.250	1	.....	n/a

1 - These frequencies may be assigned for unpaired use.

(4) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
5926.250		6178.125
5928.750		6180.625
6109.510		6361.550
6111.981		6364.021
6114.452		6366.492
6116.923		6368.963
6119.394		6371.434
6121.865		6373.905
6124.335		6376.375
6126.806		6378.846
6129.277		6381.317
6131.748		6383.788
6134.219		6386.259
6136.690		6388.730
6139.160		6391.200
6141.631		6393.671
6144.102		6396.142
6146.573		6398.613
6149.044		6401.084
6151.515		6403.555
6153.985		6406.025
6156.456		6408.496
6158.927		6410.967
6161.398		6413.438
6163.869		6415.909
6166.340		6418.380
6169.375		6421.250
6171.875		6423.750
6175.625	1	n/a

1 - This frequency may be assigned for unpaired use.

(5) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6111.364	6363.404
6116.305	6368.345
6121.247	6373.287
6126.189	6378.229
6131.130	6383.170
6136.072	6388.112

6141.014	.....	6393.054
6145.955	.....	6397.995
6150.897	.....	6402.937
6155.839	.....	6407.879
6160.780	.....	6412.820
6165.722	.....	6417.762
6175.000 1	.....	n/a

1 - This frequency may be assigned for unpaired use.

(6) 5 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
6110.75	.....	6362.79
6115.69	.....	6367.73
6120.63	.....	6372.67
6125.57	.....	6377.61
6130.51	.....	6382.55
6135.45	.....	6387.49
6140.40	.....	6392.44
6145.34	.....	6397.38
6150.28	.....	6402.32
6155.22	.....	6407.26
6160.16	.....	6412.20
6165.10	.....	6417.14

(7) 10 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
5935.32	.....	6187.36
5945.20	.....	6197.24
5955.08	.....	6207.12
5964.97	.....	6217.01
5974.85	.....	6226.89
5984.73	.....	6236.77
5994.62	.....	6246.66
6004.50	.....	6256.54
6014.38	.....	6266.42
6024.27	.....	6276.31
6034.15	.....	6286.19
6044.03	.....	6296.07
6053.92	.....	6305.96
6063.80	.....	6315.84
6073.68	.....	6325.72
6083.57	.....	6335.61
6093.45	.....	6345.49

6103.33		.....	6355.37	
6113.22	1	.....	6365.26	1
6123.10	1	.....	6375.14	1
6132.98	1	.....	6385.02	1
6142.87	1	.....	6394.91	1
6152.75	1	.....	6404.79	1
6162.63	1	.....	6414.67	1

1 - Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(8) 30 MHz bandwidth channels:

Transmit (receive) (MHz)			Receive (transmit) (MHz)	
5945.20		.....	6197.24	
5974.85		.....	6226.89	
6004.50		.....	6256.54	
6034.15		.....	6286.19	
6063.80		.....	6315.84	
6093.45		.....	6345.49	
6123.10	1	.....	6375.14	1
6152.75	1	.....	6404.79	1

1 - Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(i) 6,525 to 6,875 MHz. 10 MHz authorized bandwidth.

(1) 400 kHz bandwidth channels

Transmit (receive) (MHz)		Receive (transmit) (MHz)
6525.225	.....	6870.225
6525.625	.....	6870.625
6526.050	.....	6871.050
6526.450	.....	6871.450
6526.875	.....	6871.875
6527.275	.....	6872.275
6527.725	.....	6872.725
6528.125	.....	6873.125
6528.550	.....	6873.550
6528.950	.....	6873.950
6529.375	.....	6874.375
6529.775	.....	6874.775

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)	
6525.425		6870.425	
6526.250		6871.250	
6527.075		6872.075	
6527.925		6872.925	
6528.750		6873.750	
6529.575		6874.575	

(3) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)	
6525.625		6870.625	
6526.875		6871.875	
6528.125		6873.125	
6529.375		6874.375	
6540.625	1	6718.125	1
6541.875	1	6719.375	1
6543.125	1	6713.125	1
6544.375	1	6714.375	1
6545.625	1	6715.625	1
6546.875	1	6716.875	1
6548.125		6728.125	
6549.375		6729.375	
6550.625		6730.625	
6551.875		6731.875	
6553.125	1	6723.125	1
6554.375	1	6724.375	1
6555.625	1	6725.625	1
6556.875	1	6726.875	1
6558.125		6738.125	
6559.375		6739.375	
6560.625		6740.625	
6561.875		6741.875	
6563.125		6733.125	
6564.375		6734.375	
6565.625		6735.625	
6566.875		6736.875	
6568.125	1	6720.625	1
6569.375	1	6721.875	1
6580.625	1	6868.125	1
6581.875	1	6869.375	1
6583.125		6743.125	
6584.375		6744.375	
6585.625		6745.625	
6586.875		6746.875	

6588.125 ..... 6748.125
6589.375 ..... 6749.375
6590.625 ..... 6750.625
6591.875 ..... 6751.875
6593.125 ..... 6753.125
6594.375 ..... 6754.375
6595.625 ..... 6755.625
6596.875 ..... 6756.875
6598.125 ..... 6758.125
6599.375 ..... 6759.375
6600.625 ..... 6760.625
6601.875 ..... 6761.875
6603.125 ..... 6763.125
6604.375 ..... 6764.375
6605.625 ..... 6765.625
6606.875 ..... 6766.875
6608.125 ..... 6768.125
6609.375 ..... 6769.375
6610.625 ..... 6770.625
6611.875 ..... 6771.875
6613.125 ..... 6773.125
6614.375 ..... 6774.375
6615.625 ..... 6775.625
6616.875 ..... 6776.875
6618.125 ..... 6778.125
6619.375 ..... 6779.375
6620.625 ..... 6780.625
6621.875 ..... 6781.875
6623.125 ..... 6783.125
6624.375 ..... 6784.375
6625.625 ..... 6785.625
6626.875 ..... 6786.875
6628.125 ..... 6788.125
6629.375 ..... 6789.375
6630.625 ..... 6790.625
6631.875 ..... 6791.875
6633.125 ..... 6793.125
6634.375 ..... 6794.375
6635.625 ..... 6795.625
6636.875 ..... 6796.875
6638.125 ..... 6798.125
6639.375 ..... 6799.375
6640.625 ..... 6800.625
6641.875 ..... 6801.875
6643.125 ..... 6803.125
6644.375 ..... 6804.375
6645.625 ..... 6805.625
6646.875 ..... 6806.875
6648.125 ..... 6808.125
6649.375 ..... 6809.375
6650.625 ..... 6810.625
6651.875 ..... 6811.875
6653.125 ..... 6813.125
6654.375 ..... 6814.375

6655.625		.....	6815.625	
6656.875		.....	6816.875	
6658.125		.....	6818.125	
6659.375		.....	6819.375	
6660.625		.....	6820.625	
6661.875		.....	6821.875	
6663.125		.....	6823.125	
6664.375		.....	6824.375	
6665.625		.....	6825.625	
6666.875		.....	6826.875	
6668.125		.....	6828.125	
6669.375		.....	6829.375	
6670.625		.....	6830.625	
6671.875		.....	6831.875	
6673.125		.....	6833.125	
6674.375		.....	6834.375	
6675.625		.....	6835.625	
6676.875		.....	6836.875	
6678.125		.....	6838.125	
6679.375		.....	6839.375	
6680.625		.....	6840.625	
6681.875		.....	6841.875	
6683.125		.....	6843.125	
6684.375		.....	6844.375	
6685.625		.....	6845.625	
6686.875		.....	6846.875	
6688.125		.....	6848.125	
6689.375		.....	6849.375	
6690.625		.....	6850.625	
6691.875		.....	6851.875	
6693.125		.....	6853.125	
6694.375		.....	6854.375	
6695.625		.....	6855.625	
6696.875		.....	6856.875	
6698.125		.....	6858.125	
6699.375		.....	6859.375	
6700.625		.....	6860.625	
6701.875		.....	6861.875	
6703.125		.....	6863.125	
6704.375		.....	6864.375	
6705.625		.....	6865.625	
6706.875		.....	6866.875	
6708.125	1	.....	6710.625	1
6709.375	1	.....	6711.875	1

1 - These frequencies may be assigned for unpaired use.

(4) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)	
6526.25		6871.25	
6528.75		6873.75	
6541.25	1	6718.75	1
6543.75	1	6713.75	1
6546.25	1	6716.25	1
6548.75		6728.75	
6551.25		6731.25	
6553.75	1	6723.75	1
6556.25	1	6726.25	1
6558.75		6738.75	
6561.25		6741.25	
6563.75		6733.75	
6566.25		6736.25	
6568.75	1	6721.25	1
6581.25	1	6868.75	1
6583.75		6743.75	
6586.25		6746.25	
6588.75		6748.75	
6591.25		6751.25	
6593.75		6753.75	
6596.25		6756.25	
6598.75		6758.75	
6601.25		6761.25	
6603.75		6763.75	
6606.25		6766.25	
6608.75		6768.75	
6611.25		6771.25	
6613.75		6773.75	
6616.25		6776.25	
6618.75		6778.75	
6621.25		6781.25	
6623.75		6783.75	
6626.25		6786.25	
6628.75		6788.75	
6631.25		6791.25	
6633.75		6793.75	
6636.25		6796.25	
6638.75		6798.75	
6641.25		6801.25	
6643.75		6803.75	
6646.25		6806.25	
6648.75		6808.75	
6651.25		6811.25	
6653.75		6813.75	
6656.25		6816.25	
6658.75		6818.75	
6661.25		6821.25	
6663.75		6823.75	
6666.25		6826.25	

6668.75		.....	6828.75	
6671.25		.....	6831.25	
6673.75		.....	6833.75	
6676.25		.....	6836.25	
6678.75		.....	6838.75	
6681.25		.....	6841.25	
6683.75		.....	6843.75	
6686.25		.....	6846.25	
6688.75		.....	6848.75	
6691.25		.....	6851.25	
6693.75		.....	6853.75	
6696.25		.....	6856.25	
6698.75		.....	6858.75	
6701.25		.....	6861.25	
6703.75		.....	6863.75	
6706.25		.....	6866.25	
6708.75	1	.....	6711.25	1

1 - These frequencies may be assigned for unpaired use.

(5) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)			Receive (transmit) (MHz)	
6545.625	1	.....	6715.625	1
6550.625		.....	6730.625	
6555.625	1	.....	6725.625	1
6560.625		.....	6740.625	
6565.625		.....	6735.625	
6585.625		.....	6745.625	
6590.625		.....	6750.625	
6595.625		.....	6755.625	
6600.625		.....	6760.625	
6605.625		.....	6765.625	
6610.625		.....	6770.625	
6615.625		.....	6775.625	
6620.625		.....	6780.625	
6625.625		.....	6785.625	
6630.625		.....	6790.625	
6635.625		.....	6795.625	
6640.625		.....	6800.625	
6645.625		.....	6805.625	
6650.625		.....	6810.625	
6655.625		.....	6815.625	
6660.625		.....	6820.625	
6665.625		.....	6825.625	
6670.625		.....	6830.625	
6675.625		.....	6835.625	
6680.625		.....	6840.625	
6685.625		.....	6845.625	
6690.625		.....	6850.625	

6695.625		.....	6855.625	
6700.625		.....	6860.625	
6705.625		.....	6865.625	
6710.625	1	.....	6720.625	1

1 - These frequencies may be assigned for unpaired use.

(6) 5 MHz bandwidth channels:

Transmit (receive) (MHz)			Receive (transmit) (MHz)	
6545	1	.....	6715	1
6550		.....	6730	
6555	1	.....	6725	1
6560		.....	6740	
6565		.....	6735	
6585		.....	6745	
6590		.....	6750	
6595		.....	6755	
6600		.....	6760	
6605		.....	6765	
6610		.....	6770	
6615		.....	6775	
6620		.....	6780	
6625		.....	6785	
6630		.....	6790	
6635		.....	6795	
6640		.....	6800	
6645		.....	6805	
6650		.....	6810	
6655		.....	6815	
6660		.....	6820	
6665		.....	6825	
6670		.....	6830	
6675		.....	6835	
6680		.....	6840	
6685		.....	6845	
6690		.....	6850	
6695		.....	6855	
6700		.....	6860	
6705		.....	6865	
6710	1	.....	6720	1

1 - These frequencies may be assigned for unpaired use.

(7) 10 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)	
6545	1	6715	1
6555	1	6725	1
6565		6735	
6585		6745	
6595		6755	
6605		6765	
6615		6775	
6625		6785	
6635		6795	
6645		6805	
6655		6815	
6665		6825	
6675		6835	
6685		6845	
6695		6855	
6705		6865	
6535	2	6575	2

1 - These frequencies may be assigned for unpaired use.
2 - Available only for emergency restoration, maintenance bypass, or other temporary-fixed purposes. Such uses are authorized on a non-interference basis to other frequencies in this band. Interference analysis required by Section 94.63 does not apply to this frequency pair.

(j) 10,550 to 10,680 MHz. 5 MHz authorized bandwidth.

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10605.225	10670.225
10605.625	10670.625
10606.050	10671.050
10606.450	10671.450
10606.875	10671.875
10607.275	10672.275
10607.725	10672.725
10608.125	10673.125
10608.550	10673.550
10608.950	10673.950
10609.375	10674.375
10609.775	10674.775
10610.225	10675.225
10610.625	10675.625
10611.050	10676.050

10611.450	10676.450
10611.875	10676.875
10612.275	10677.275
10612.725	10677.725
10613.125	10678.125
10613.550	10678.550
10613.950	10678.950
10614.375	10679.375
10614.775	10679.775

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10605.425	10670.425
10606.250	10671.250
10607.075	10672.075
10607.925	10672.925
10608.750	10673.750
10609.575	10674.575
10610.425	10675.425
10611.250	10676.250
10612.075	10677.075
10612.925	10677.925
10613.750	10678.750
10614.575	10679.575

(3) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10550.625	10615.625
10551.875	10616.875
10553.125	10618.125
10554.375	10619.375
10555.625	10620.625
10556.875	10621.875
10558.125	10623.125
10559.375	10624.375
10560.625	10625.625
10561.875	10626.875
10563.125	10628.125
10564.375	10629.375
10565.625	10630.625
10566.875	10631.875
10568.125	10633.125
10569.375	10634.375
10570.625	10635.625

10571.875	10636.875
10573.125	10638.125
10574.375	10639.375
10575.625	10640.625
10576.875	10641.875
10578.125	10643.125
10579.375	10644.375
10580.625	10645.625
10581.875	10646.875
10583.125	10648.125
10584.375	10649.375
10585.625	10650.625
10586.875	10651.875
10588.125	10653.125
10589.375	10654.375
10590.625	10655.625
10591.875	10656.875
10593.125	10658.125
10594.375	10659.375
10595.625	10660.625
10596.875	10661.875
10598.125	10663.125
10599.375	10664.375
10600.625	10665.625
10601.875	10666.875
10603.125	10668.125
10604.375	10669.375
10605.625	10670.625
10606.875	10671.875
10608.125	10673.125
10609.375	10674.375
10610.625	10675.625
10611.875	10676.875
10613.125	10678.125
10614.375	10679.375

(4) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10551.25	10616.25
10553.75	10618.75
10556.25	10621.25
10558.75	10623.75
10561.25	10626.25
10563.75	10628.75
10566.25	10631.25
10568.75	10633.75
10571.25	10636.25
10573.75	10638.75
10576.25	10641.25

10578.75	.....	10643.75
10581.25	1.....	10646.25 1
10583.75	1.....	10648.75 1
10586.25	1.....	10651.25 1
10588.75	1.....	10653.75 1
10591.25	1.....	10656.25 1
10593.75	1.....	10658.75 1
10596.25	1.....	10661.25 1
10598.75	1.....	10663.75 1
10601.25	.....	10666.25
10603.75	.....	10668.75
10606.25	1.....	10671.25 1
10608.75	.....	10673.75
10611.25	1.....	10676.25 1
10613.75	.....	10678.75

1 These frequencies are also available for DTS stations licensed, in operation, or applied for prior to July 15. 1993.

(5) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
10553.125	.....	10618.125
10558.125	.....	10623.125
10563.125	.....	10628.125
10568.125	.....	10633.125
10573.125	.....	10638.125
10578.125	.....	10643.125
10583.125	.....	10648.125
10588.125	.....	10653.125
10593.125	.....	10658.125
10598.125	.....	10663.125
10603.125	.....	10668.125

(6) 5 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
10552.5	.....	10617.5
10557.5	.....	10622.5
10562.5	.....	10627.5
10567.5	.....	10632.5
10572.5	.....	10637.5
10577.5	.....	10642.5
10582.5	.....	10647.5
10587.5	.....	10652.5
10592.5	.....	10657.5
10597.5	.....	10662.5

10602.5 ..... 10667.5

(k) 10,700 to 11,700 MHz. 40 MHz authorized bandwidth.

(1) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
11130.625	11620.625
11131.875	11621.875
11133.125	11623.125
11134.375	11624.375
11135.625	11625.625
11136.875	11626.875
11138.125	11628.125
11139.375	11629.375
11140.625	11630.625
11141.875	11631.875
11143.125	11633.125
11144.375	11634.375
11145.625	11635.625
11146.875	11636.875
11148.125	11638.125
11149.375	11639.375
11150.625	11640.625
11151.875	11641.875
11153.125	11643.125
11154.375	11644.375
11155.625	11645.625
11156.875	11646.875
11158.125	11648.125
11159.375	11649.375
11160.625	11650.625
11161.875	11651.875
11163.125	11653.125
11164.375	11654.375
11165.625	11655.625
11166.875	11656.875
11168.125	11658.125
11169.375	11659.375
11170.625	11660.625
11171.875	11661.875
11173.125	11663.125
11174.375	11664.375
11175.625	11665.625
11176.875	11666.875
11178.125	11668.125
11179.375	11669.375
11180.625	11680.625
11181.875	11681.875
11183.125	11683.125
11184.375	11684.375

11185.625	.....	11685.625
11186.875	.....	11686.875
11188.125	.....	11688.125
11189.375	.....	11689.375
11190.625	.....	11690.625
11191.875	.....	11691.875
11193.125	.....	11693.125
11194.375	.....	11694.375
11195.625	.....	11695.625
11196.875	.....	11696.875
11198.125	.....	11698.125
11199.375	.....	11699.375

(2) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
11131.25	.....	11621.25
11133.75	.....	11623.75
11136.25	.....	11626.25
11138.75	.....	11628.75
11141.25	.....	11631.25
11143.75	.....	11633.75
11146.25	.....	11636.25
11148.75	.....	11638.75
11151.25	.....	11641.25
11153.75	.....	11643.75
11156.25	.....	11646.25
11158.75	.....	11648.75
11161.25	.....	11651.25
11163.75	.....	11653.75
11166.25	.....	11656.25
11168.75	.....	11658.75
11171.25	.....	11661.25
11173.75	.....	11663.75
11176.25	.....	11666.25
11178.75	.....	11668.75
11181.25	.....	11681.25
11183.75	.....	11683.75
11186.25	.....	11686.25
11188.75	.....	11688.75
11191.25	.....	11691.25
11193.75	.....	11693.75
11196.25	.....	11696.25
11198.75	.....	11698.75

(3) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
11133.125	.....	11623.125
11138.125	.....	11628.125
11143.125	.....	11633.125
11148.125	.....	11638.125
11153.125	.....	11643.125
11158.125	.....	11648.125
11163.125	.....	11653.125
11168.125	.....	11658.125
11173.125	.....	11663.125
11178.125	.....	11668.125
11183.125	.....	11683.125
11188.125	.....	11688.125
11193.125	.....	11693.125
11198.125	.....	11698.125

(4) 5 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
11132.5	.....	11622.5
11137.5	.....	11627.5
11142.5	.....	11632.5
11147.5	.....	11637.5
11152.5	.....	11642.5
11157.5	.....	11647.5
11162.5	.....	11652.5
11167.5	.....	11657.5
11172.5	.....	11662.5
11177.5	.....	11667.5
11182.5	.....	11682.5
11187.5	.....	11687.5
11192.5	.....	11692.5
11197.5	.....	11697.5

(5) 10 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)	
10705	.....	11205	
10715	.....	11215	
10725	2	11675	1
10735	.....	11225	
10745	.....	11235	

10755		.....	11245	
10765		.....	11255	
10775		.....	11265	
10785		.....	11275	
10795		.....	11285	
10805		.....	11295	
10815		.....	11305	
10825		.....	11315	
10835		.....	11325	
10845		.....	11335	
10855		.....	11345	
10865		.....	11355	
10875		.....	11365	
10885		.....	11375	
10895		.....	11385	
10905		.....	11395	
10915		.....	11405	
10925		.....	11415	
10935		.....	11425	
10945		.....	11435	
10955		.....	11445	
10965		.....	11455	
10975		.....	11465	
10985		.....	11475	
10995		.....	11485	
11005		.....	11495	
11015		.....	11505	
11025		.....	11515	
11035		.....	11525	
11045		.....	11535	
11055		.....	11545	
11065		.....	11555	
11075		.....	11565	
11085		.....	11575	
11095		.....	11585	
11105		.....	11595	
11115		.....	11605	
11125		.....	11615	
11135	1	.....	11625	2
11145	1	.....	11635	1
11155	1	.....	11645	1
11165	1	.....	11655	1
11175	1	.....	11665	1
11185	1	.....	11685	1
11195	1	.....	11695	1

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1 Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

2 These frequencies may be assigned for unpaired use.

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(6) 30 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)	
10715		11215	
10755		11245	
10795		11285	
10835		11325	
10875		11365	
10915		11405	
10955		11445	
10995		11485	
11035		11525	
11075		11565	
11115		11605	
11155	1	11645	1
11185	1	11685	1

1 Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(7) 40 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)	
10735		11225	
10775		11265	
10815		11305	
10855		11345	
10895		11385	
10935		11425	
10975		11465	
11015		11505	
11055		11545	
11095		11585	
11135	1	11625	1
11175	1	11665	1

1 Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(l) * * * (formerly (h))

(m)(1)-(7) * * * (formerly (j)(1)-(7))

(m)(8) The following frequencies are available for point-to-multipoint systems, except that systems licensed, in operation, or applied for in the 10,565-10,615 and 10,630-10,680 MHz bands

prior to July 15, 1993 are permitted to use frequencies in those bands if they prior coordinate with 10 GHz point-to-point licensees:

* * * * *

(n) * * * (formerly (k))

(o) * * * (formerly (l))

(p) * * * (formerly (m))

(q) Fixed systems licensed, in operation, or applied for in the 6525-6875 and 10,550-10,680 MHz bands prior to July 15, 1993 are permitted to use channel plans in effect prior to that date, including adding channels under those plans.

(r) Frequency diversity transmission will not be authorized in this service in the absence of a factual showing that the required communications cannot practically be achieved by other means. Where frequency diversity is deemed to be justified on a protection channel basis, it shall be limited to one protection channel for the bands 3700-4200, 5925-6425, and 6525-6875 MHz, and a ratio of one protection channel for three working channels for the bands 10,550-10,680 and 10,700-11,700 MHz. In the bands 3700-4200, 5925-6425, and 6525-6875 MHz, no frequency diversity protection channel will be authorized unless there is a minimum of three working channels, except that where a substantial showing is made that a total of three working channels will be required within three years, a protection channel may be authorized simultaneously with the first working channel. A protection channel authorized under such exception will be subject to termination if applications for the third working channel are not filed within three years of the grant date of the applications for the first working channel. Where equipment employing digital modulation techniques with cross-polarized operation on the same frequency is used, the protection channel authorized under the above conditions may be considered to consist of both polarizations of the protection frequency where such is shown to be necessary.

Section 94.71 Emission and bandwidth limitations.

* * * * *

(b) The maximum bandwidth that will be authorized per frequency is set out in the table that follows. Regardless of the maximum authorized bandwidth specified for each frequency band, the Commission reserves the right to issue a license for less than the maximum bandwidth if it appears that a lesser bandwidth would be sufficient to support an applicant's intended communications.

Frequency Band (MHz)	Maximum authorized bandwidth
928-929	12.5, 25 kHz 1 6
932-932.5, 941-941.5	12.5 kHz 1
932.5-935, 941.5-944	12.5, 25, 50, 100, 200kHz 1
952-960	12.5, 25, 50, 100, 200 kHz 1 5
1850-1990	5 or 10 MHz 1
2130-2150	800 or 1600 kHz 1
2150-2160	10 MHz
2180-2200	800 or 1600 kHz 1
2450-2483.5	625 kHz 2
2483.5-2500	800 kHz
3700-4200	20 MHz
5925-6425	30 MHz
6425-6525	25 MHz
6525-6875	10 MHz
10,550-10,680	5 MHz
10,700-11,700	40 MHz
12,200-12,700	10 or 20 MHz 1
13,200-13,250	25 MHz
17,700-18,140	80 MHz
18,140-18,142	2 MHz
18,142-18,580	6 MHz
18,580-18,820	20 MHz
18,820-18,920	10 MHz
18,920-19,160	20 MHz
19,160-19,260	10 MHz
19,260-19,700	80 MHz
21,200-23,600	up to 100 MHz 4
31,000-31,300	25 or 50 MHz
38,600-40,000	up to 50 MHz
Bands above 40,000 3	

* * * * *

Section 94.73 Power limitations.

(a) On any authorized frequency, the average power delivered to an antenna in this service shall be the minimum amount of power necessary to carry out the communications desired. Application of this principle shall include, but not be limited to, requiring a licensee who replaces one or more of his antennas with larger antennas to reduce his antenna input power by an amount appropriate to compensate for the increased primary lobe gain of the replacement antenna(s). In no event shall the average equivalent isotropically radiated power (EIRP), as referenced to an isotropic radiator, exceed the values specified below. Further, the output power of a transmitter on any authorized frequency in this service shall not exceed the following:

Frequency Band (MHz)	Maximum allowable transmitter power		Maximum allowable EIRP(1)	
	Fixed(W)	Mobile(W)	Fixed(dBW)	Mobile(dBW)
928 to 929	5.0		+17	
932 to 932.5			+17	
932.5 to 935	20.0		+40	
941 to 941.5			+30	
941.5 to 944	20.0		+40	
952 to 960	(6)20.0		(2)+40	
1850 to 1990	20.0		+45	
2130 to 2150	20.0		+45	
2150 to 2160	20.0		(2)+45	
2180 to 2200	20.0		+45	
2450 to 2500	20.0		+45	
3700 to 4200	20.0		+50	
5925 to 6425	20.0		+55	
6425 to 6525	20.0		+35	
6525 to 6875	20.0		+50	
10,550 to 10,680	(4)10.0		+50	
10,700 to 11,700	10.0		+50	
12,200 to 12,700	(7)10.0		+50	
12,700 to 13,250	10.0		(3)+50	
17,700 to 18,600	10.0		+55	
18,600 to 18,800	(5)10.0		+35	
18,800 to 19,700	10.0		+55	
21,200 to 23,600	(7)10.0		+40	
31,000 to 31,300	0.05	0.05		
38,600 to 40,000	10.0		+40	

1 Peak envelope power shall not exceed five times the average power.
2 For multiple address operations, see Section 94.65(a)(1)(v). When an omnidirectional antenna is authorized in the 2150-2160 MHz band, the maximum power shall be 60 dBm.
3 Also, see Section 94.77.
4 The output power of a Digital Termination System nodal transmitter shall not exceed 0.5 watts per 250 kHz. The output power of a Digital Termination system user transmitter shall not exceed 0.04 watts per 250 kHz. The transmitter power in terms of the watts specified is the peak envelope power of the emission measured at the associated antenna input port. The operating power shall not exceed the authorized power by more than 10 percent of the authorized power in watts at any time.
5 Maximum power delivered to antenna shall not exceed -3 dBW.
6 Remote alarm units that are part of a multiple address central station protection system are authorized a maximum of 2 watts.
7 Also, see Sections 94.90 and 94.91.

* * * * *

Section 94.75 Antenna Limitations.

* * * * *

(b) Directional antennas shall meet the performance standards (for parallel polarization) indicated in the following table:

Antenna Standards

Frequency(MHz)	Category	Maximum beam-width to 3 dB points (included angle in degrees)	Minimum antenna gain (dBi)	Minimum radiation suppression to angle in degrees from centerline of main beam in decibels						
				5° to 10°	10° to 15°	15° to 20°	20° to 30°	30° to 100°	100° to 140°	140° to 180°
932.5 to 935	A	14.0	n/a		6	11	14	17	20	24
941.5 to 944	B	20.0	n/a			6	10	13	15	20
952 to 960 (1) (4)	A	14.0	n/a		6	11	14	17	20	24
	B	20.0	n/a			6	10	13	15	20
1,850 to 2,500 (2)	A	5.0	n/a	12	18	22	25	29	33	39
	B	8.0	n/a	5	18	20	20	25	28	36
3,700 to 4,200	A	n/a	36	23	29	33	36	42	55	55
	B	n/a	36	20	24	28	32	32	32	32
5,925 to 6,875 (10)	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
6,525 to 6,875 (11)	A	1.5	n/a	26	29	32	34	38	41	49
	B	2.0	n/a	21	25	29	32	35	39	45
10,550 to 10,680 (3)	A	3.4	34	20	24	28	32	35	55	55
(9)	B	3.4	34	20	24	28	32	35	35	39
10,565 to 10,615 (3) (12)	n/a	360	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
10,630 to 10,680 (3) (12)	n/a	n/a	34	20	24	28	32	35	36	36
10,700 to 11,700 (10)	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
12,200 to 13,250 (6)	A	1.0	n/a	23	28	35	39	41	42	50
	B	2.0	n/a	20	25	28	30	32	37	47
17,700 to 19,700 (3)	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
21,200 to 23,600 (5)	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
31,000 to 31,300 (7) (8)	n/a	4.0	38	n/a	n/a	n/a	n/a	n/a	n/a	n/a
38,600 to 40,000	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36

Footnotes (1) to (9) * * *

(10) These antenna standards apply to all point-to-point stations authorized after June 1, 1997. Existing licensees and pending applicants on that date are grandfathered and need not comply with these standards.

(11) These antenna standards apply to all point-to-point stations authorized on or before June 1, 1997.

(12) These antenna standards apply only to Digital Termination User Stations licensed, in operation, or applied for prior to July 15, 1993.

* * * * *

Section 94.77 Interference to geostationary-satellites.

These limitations are necessary to minimize the probability of harmful interference to reception in the bands 2655-2690 MHz, 5925-6875 MHz, and 12.7-12.75 GHz on board geostationary-space stations in the fixed-satellite service (Part 25). Stations authorized in the band 2655-2690 MHz prior to July 1, 1976 that exceed the power levels in paragraphs (a) and (b) of this section are permitted to operate indefinitely, provided that the operation of such stations does not result in harmful interference to reception in this band on board geostationary space stations.

(a) 2655 to 2690 MHz and 5925 to 6875 MHz. * * *

* * * * *

Section 94.79 Minimum path lengths for fixed links.

(a) The distance between end points of a fixed link must equal or exceed the value set forth in the table below or the EIRP must be reduced in accordance with the equation set forth below.

Frequency Band (MHz)	Minimum path length (km)
Below 1,850	n/a
1,850 to 7,125	17
10,550 to 13,250	5
Above 17,700	n/a

(b) For paths shorter than those specified in the Table, the EIRP shall not exceed the value derived from the following equation.

EIRP = 30 - 20 log[A/B], dBW

Where:

EIRP = Equivalent isotropic radiated power in dBW.
A = Minimum path length from the Table for the frequency band in kilometers.
B= The actual path length in kilometers.

NOTE: Automatic transmit power control may be used to meet this requirement pursuant to Section 94.45.

(c) Upon an appropriate technical showing, applicants and licensees unable to meet the minimum path length requirement may be granted an exception to these requirements.

NOTE. Links authorized prior to April 1, 1987 need not comply with this requirement.

Section 94.81 Authorization of microwave equipment.

* * * * *

(c) After July 15, 1994, the manufacture (except for export) or importation of equipment employing digital modulation techniques in the 3700-4200, 5925-6425, 6525-6875, 10,550-10,680, and 10,700-11,700 MHz bands must meet the minimum payload capacity requirements of Section 21.122(a)(3).

Section 94.94 Microwave digital modulation.

Microwave transmitters employing digital modulation techniques in the 17,700-19,700 MHz band shall transmit at a bit rate, in bits per second (bps), equal to or greater than the authorized bandwidth in Hertz (e.g., to be acceptable, equipment transmitting at a 20 Mbps rate must not require an authorized bandwidth greater than 20 MHz). This bps/Hz standard is independent of the antenna (polarization) used, frequency reuse, or how the system is configured. For equipment applied for, authorized, and placed in service after June 1, 1997 in the 3700-4200, 5925-6425, 6525-6875, 10,550-10,680, and 10,700-11,700 MHz bands, standards of Section 21.122(a)(3) shall be met.

NOTE: Systems authorized in the 17,700-19,700 MHz band prior to December 1, 1988 may install equipment with no minimum bit rate.

Appendix B -- Commenting Parties to the Further Notice

Comments

Alcatel Network Systems, Inc.
American Personal Communications
American Petroleum Institute
American Telephone and Telegraph Company
Associated PCN Company and Associated Communications of Los Angeles
Association of American Railroads
Bell Atlantic Companies
Comsearch
EMI Communications Corporation
GE American Communications, Inc.
GTE Service Corporation
Harris Corporation - Farinon Division, Digital Microwave Corporation, and Telesciences, Inc.
Home Box Office
Hughes Communications Galaxy, Inc.
Lower Colorado River Authority
MCI Telecommunications Corporation
Motorola Inc.
MRC Telecommunications, Inc.
National Association of Broadcasters
National Public Radio, Inc.
National Spectrum Managers Association, Inc.
Northern Telecom
Pacific Telesis Group
Public Broadcasting Service
Satellite Broadcasting And Communications Association
SR Telecom, Inc.
Telecommunications Industry Association, Fixed Point-to-Point Communications Section
United States Telephone Association
Utilities Telecommunications Council
Western Tele-Communications, Inc.

Reply Comments or Supplemental Comments

Alcatel Network Systems, Inc.
American Petroleum Institute
Association of American Railroads
Bell Atlantic Companies
Comsearch
Digital Microwave Corporation
EMI Communications Corporation
GE American Communications, Inc.
GTE Service Corporation
Home Box Office
Hughes Communications Galaxy, Inc.
Lower Colorado River Authority
McCaw Cellular Communications, Inc.
MCI Telecommunications Corporation
Microwave Networks Incorporated
National Public Radio, Inc.
National Spectrum Managers Association, Inc.
The New Orleans Teleport
Pacific Telesis Group
Satellite Broadcasting And Communications Association
Telecommunications Industry Association,
Fixed Point-to-Point Communications Section
Telesciences, Inc., Harris Corporation-Farinon Division, and
Digital Microwave Corporation
US West
Utilities Telecommunications Council
Western Multiplex Corporation, Burlington Northern Railroad, and
Colorado Interstate Gas Company
Western Tele-Communications, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-351
Washington, D.C. 20554

In the Matter of	)	
	)	
Redevelopment of Spectrum to	)	ET Docket No. 92-9
Encourage Innovation in the	)	
Use of New Telecommunications	)	RM-7981
Technologies	)	RM-8004

Third Report and Order and Memorandum Opinion and Order

Adopted: July 15, 1993; Released: August 13, 1993

By the Commission: Commissioner Barrett issuing a statement.

INTRODUCTION

1. By this action, the Commission is adopting a plan that will provide for the fair and equitable sharing of 2 GHz spectrum by new services and the existing fixed microwave services that currently use these frequencies, and for the relocation of existing 2 GHz facilities to other spectrum where necessary. The plan that we are adopting herein is intended to provide licensees of services using emerging technologies with access to 2 GHz frequencies in a reasonable timeframe, and at the same time prevent disruption to existing 2 GHz operations and minimize the economic impact on the existing licensees. By this action, the Commission also addresses several petitions for clarification and reconsideration of its earlier decisions in this proceeding.[1]

2. The plan we are adopting provides separate relocation policies for frequencies to be used by licensed emerging technology services and those to be used for unlicensed devices. For licensed services, we are providing a fixed two year period commencing with the Commission's acceptance of applications for services that use new technologies. During this period we

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[1] See Petitions for Clarification and Reconsideration filed by American Public Power Association (APPA), Apple Computer, Inc. (Apple), Pacific Telesis Group (Telesis) and the Utilities Telecommunications Council (UTC). These parties request reconsideration or clarification of issues addressed in the First Report and Order in this proceeding that involve the involuntary relocation of existing 2 GHz facilities and the exemption of public safety 2 GHz fixed facilities from involuntary relocation. See First Report and Order and Third Notice of Proposed Rule Making, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992).

encourage but do not require negotiation over the terms of relocation. After this fixed period expires, an emerging technology licensee may initiate a one year period for mandatory negotiations between the fixed microwave licensee and the emerging technology licensee. For unlicensed devices, we are adopting a single one year mandatory negotiation period that will commence with the initiation of negotiations by manufacturers of unlicensed devices or their representatives. For both licensed services and unlicensed devices, after expiration of the mandatory negotiation period involuntary relocation of the fixed microwave facilities may be sought if agreement is not reached by the parties. In all instances of involuntary relocation the emerging technology provider will be required to pay all costs associated with the relocation.

3. Finally, existing 2 GHz public safety facilities are exempt from mandatory relocation, provided that the majority of communications carried on these facilities are directly used for police, fire, or emergency medical services operations involving safety of life and property. The facilities within this exception are those Part 94 facilities currently licensed on a primary basis under Section 90.19 Police Radio Service; Section 90.21 Fire Radio Service; Section 90.27 Emergency Medical Radio Service; and Subpart C of Part 90, Special Emergency Radio Services. As an additional safeguard, current licensees of other Part 94 facilities licensed on a primary basis under the eligibility requirements of Part 90 Subparts B and C may request similar treatment upon demonstrating that the majority of the communications carried on those facilities are used for operations involving safety of life and property.

BACKGROUND

4. In the First Report and Order and Third Notice of Proposed Rule Making (First R&O/Third Notice) in this proceeding, we reallocated 220 megahertz of spectrum between 1.85 and 2.20 GHz for future communications services and devices that employ emerging technologies.[2] In making this allocation, we adopted a plan for reaccommodation of existing 2 GHz fixed microwave users

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[2] The specific services that will use this spectrum will be authorized in concurrent and future proceedings addressing specific services that use emerging technologies. The first of these proceedings addresses personal communications services (PCS), see Notice of Proposed Rule Making and Tentative Decision, GEN Docket No. 90-314 and ET Docket No. 92-100, 7 FCC Rcd 5676, Erratum, 7 FCC Rcd 5779 (1992), First Report and Order, FCC 93-329, released July 23, 1993.

in higher frequency bands.[3] This plan was intended to provide for reaccommodation of existing 2 GHz fixed operations in a manner that will be advantageous to the licensees of the existing fixed operations, not disrupt those communications services, and foster introduction of new services and devices.

5. The reaccommodation plan encourages existing 2 GHz licensees to negotiate voluntary relocation agreements. We emphasized, however, that all existing fixed microwave operations will retain co-primary status with new services and devices. If an emerging technology service or unlicensed device manufacturer needs an existing 2 GHz facilities frequency, the parties are encouraged to negotiate a voluntary relocation agreement. Should they fail to reach agreement, the emerging technology service provider or unlicensed device manufacturer could request involuntary relocation of the existing facility. In such a case, the emerging technology service provider must:[4]

1) Guarantee payment of all costs of relocating to a comparable facility. Relocation costs include all engineering, equipment, and site costs and FCC fees, as well as any reasonable additional costs.
2) Complete all activities necessary for placing the new facilities into operation, including engineering and frequency coordination.
3) Build and test the new microwave (or alternative) system.

Finally, existing 2 GHz fixed microwave operations licensed to the public safety and special emergency radio services were exempted from the involuntary relocation process.

6. We sought comment on the length of the period to provide only for voluntary negotiated relocations. We also sought comment on the definition of comparable facilities; whether a negotiated rule making might be beneficial in defining comparable facilities; and on a dispute resolution process for cases where disagreements arise over involuntary relocation or comparability.

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[3] Multipoint Distribution Service (MDS) licensees operating on MDS channel 2, or successful applicants for channel 2 that filed applications prior to January 16, 1992, are authorized to operate in the 2160-2162 MHz band on a primary basis, see First Report and Order, supra note 1, 7 FCC Rcd 6886 at note 22.

[4] See First R&O/Third Notice, supra note 1, at para. 24.

DISCUSSION

Transition

7. In the First R&O/Third Notice, we solicited comment on the length of a period for voluntary negotiation during which relocation of incumbent fixed microwave facilities would be accomplished only by the mutual agreement of the fixed microwave operator and the emerging technology provider authorized to operate in the same spectrum in the same geographic area. We stated that such a period would allow introduction of new services and unlicensed devices and provide for the relocation of the incumbent licensees without undue disruption to the incumbent licensees' services. We suggested that between 3 and 10 years may be appropriate for such a voluntary negotiation period. We also requested comment on whether no voluntary period would be appropriate in some instances, particularly in the case of unlicensed devices. We requested comment on whether affected fixed users should be given priority access to government spectrum or other 2 GHz spectrum if they cannot be accommodated in higher bands. We proposed that the voluntary period commence on the adoption date of a report and order that addresses channeling of the higher fixed microwave bands available for the relocation of incumbent 2 GHz fixed microwave licensees.[5] We also requested comment on whether we should establish a minimum time period for voluntary negotiations after the grant of a license to an emerging technology service provider, such as one year.

8. Transition Framework. Most parties generally support the Commission's expressed concern that the needs of incumbent 2 GHz fixed microwave licensees be balanced with those of emerging technology providers. However, no consensus appeared on the length of time voluntary agreements should be the sole method of relocation and when involuntary relocation should be permitted after the voluntary process has not resulted in an agreement. At the extremes, some parties representing potential emerging technology providers argue that involuntary relocation should be available immediately, or within three years.[6] Others argue for an exclusive voluntary negotiation period of up to 15 years before involuntary relocation could be considered.

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[5] See Further Notice of Proposed Rule Making, ET Docket No. 92-9, 7 FCC Rcd 6100 (1992).

[6] See American Personal Communications (APC) at 7, Apple at 8, and Personal Communications Network Services of New York, Inc. at 14.

9. Several emerging technology proponents argue that no voluntary period is required because protections afforded incumbents ensure that they will not be harmed. Such protections include requirements that incumbents have all their expenses for an entire new system paid by the new provider.[7] Others argue for a short voluntary period on public policy grounds. These parties state that permitting involuntary relocation early in the process as a remedy to stalled or unsuccessful negotiations would hasten the introduction of new services, prevent incumbent users from extracting windfall profits from new providers, and encourage investment in new technologies.[8] They also argue that a longer voluntary period would frustrate pent-up demand for new services, jeopardize America's world leadership position, and cost the U.S. economy billions of dollars.[9]

10. On the other hand, a number of fixed microwave licensees argue for longer periods before permitting involuntary relocation, typically from 5 to 10 years, with some requesting up to 15 years.[10] Incumbents argue that a longer period is needed during which the only mechanism for relocation is voluntary agreements to ensure that incumbents have reasonable time to negotiate before being subjected to involuntary relocation. This would give companies that recently have purchased new equipment time to recoup their investment,[11] to ease migration difficulties in geographic areas where suitable spectrum is scarce, and to ensure a seamless, disruption-free relocation to other bands.[12]

11. Emerging technology proponents that support some minimum period before permitting involuntary relocations generally argue that the voluntary period should begin upon the

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[7] See Cox Enterprises, Inc. at 4-7, Telesis at 1-3, and Telocator at 7.

[8] See Ameritech at 3 and APC at 4-7.

[9] See Time Warner Telecommunications (Time Warner) at 5-10.

[10] See American Gas Association (AGA) at 2-3, American Petroleum Institute (API) at 4-7, Association of American Railroads (AAR) at 14-17, and Idaho Power Company (Idaho Power) at 1.

[11] Idaho Power states that a 15 year period is needed because microwave radios are being replaced on a 15 year cycle and the best time to move is when equipment is being replaced. See Idaho Power at 1.

[12] See APPA at 3-5, AGA at 2-3, API at 8-9, and GE American Communications, Inc. at 4-5.

adoption of the instant decision, or upon adoption of channeling plans for the higher fixed microwave bands.[13] They argue this would avoid unnecessary delay in implementing new services. Incumbents supporting longer fixed periods argue for a "rolling" or "sliding" period that would commence with the date a license or construction permit is issued for an emerging technology facility.[14] They argue that some reasonable period of time is needed to engineer a move due to the complexities and difficulties of migration. Some incumbents also argue for a one year voluntary negotiation period after an incumbent has been notified in writing by an emerging technology licensee.[15]

12. Finally, Personal Communications Network Services of New York, Inc. (PCNS) argues that instead of providing for involuntary relocation, the Commission should set a fixed date, after which incumbents would be reduced to secondary status but permitted to apply for a waiver to continue on a primary basis.[16] PCNS states that this alternative scheme would provide greater incentive for successful voluntary negotiations and place the burden on the incumbents to demonstrate why relocation is infeasible.

13. Transition for Licensed Emerging Technology Services. In considering transition mechanisms for licensed services, we observe that the 2 GHz fixed microwave bands support important communications providing vital services to the public. We consider it essential that the process not disrupt the communications services provided by the existing 2 GHz fixed microwave operations. We continue to believe that in most cases in which relocation is necessary voluntary negotiations will be successful and will result in the least disruptive means for accommodating new emerging technology services in this spectrum.

14. We are concerned, however, that a lengthy period during which no mechanism is available to resolve stalled or failed negotiations to remove an impasse created by an uncooperative party could delay implementation of new services unreasonably. Undue delay would be inconsistent with the public interest in

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[13] See United States Telephone Association (USTA) at 3 and APC at 7. Inasmuch as the channeling plan was adopted today in a Second Report and Order in this proceeding, the time is identical under either proposal.

[14] See APPA at 3 and Lower Colorado River Authority (LCRA) at 14-18.

[15] See Ameritech at 5 and Southern Natural Gas Company at 2-4.

[16] See PCNS at 7-8.

fostering and implementing new services that utilize emerging technologies as quickly as possible.

15. We conclude that providing two periods that must expire before an emerging technology licensee may proceed to request involuntary relocation is the best way to proceed. The first is a fixed two year period for voluntary negotiations commencing with our acceptance of applications for emerging technology services. During this period the parties are encouraged to negotiate and reach agreement on relocation, but are not required to do so. The second is a one year mandatory negotiation period starting anytime after the two year voluntary period upon the written request to an existing 2 GHz licensee by an emerging technology licensee to negotiate relocation terms. During this period parties are required to negotiate in good faith.

16. We believe that these voluntary and mandatory negotiation periods provide a reasonable balance between the need to ensure orderly relocation of fixed microwave facilities where necessary to permit provision of emerging technology services and the national interest in facilitating development of new technologies and services. An initial two year period will prevent disruption of the existing 2 GHz services. The one year mandatory negotiation period ensures that an incumbent licensee will not be faced with a sudden or unexpected demand for involuntary relocation if an emerging technology provider initiates its relocation request after the two-year initial period. These periods provide adequate time for fixed microwave licensees to prepare for relocation and encourage good faith and fair voluntary negotiations. Finally, we note that incumbents subject to involuntary relocation will have the entire relocation cost paid by the emerging technology service provider.[17] They will not incur the cost of the relocation, and in fact will benefit to the degree that aging equipment using older technology may be replaced with new equipment using state-of-the-art technology.[18]

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[17] Indeed, the success of this negotiation and relocation process is not so dependent on the time periods as on the availability and provision of replacement facilities. As discussed later, if comparable facilities cannot be provided, even those licensees subject to involuntary relocation cannot be required to relocate.

[18] Because replacement equipment must be provided at no cost to existing licensees, concerns for amortizing or recouping investment in existing equipment are misplaced. Such replacement equipment will operate during the original amortization period that would have applied to the old equipment.

17. Further, these periods permit incumbent licensees to continue using these bands in areas where spectrum is not sought for emerging technologies. A significant number of fixed microwave facilities, particularly in rural areas, may remain in the band and not be subject to relocation for a substantial period of time where the spectrum is not requested by an emerging technology licensee. Finally, by spreading out the initial relocation process, the demand on engineering and equipment resources needed to accomplish the relocation will be spread over a number of years. This will facilitate resolution of the complexities and difficulties of relocation.

18. We are not adopting PCNS' suggestion that all incumbent facilities be made secondary to emerging technology services on a fixed date. While this might encourage the negotiation process, it potentially could unduly disrupt the existing 2 GHz services. If our framework based on voluntary negotiations and relocation is unsuccessful, however, we may be requested to revisit this issue or revisit our role in this process.

19. Transition for Unlicensed Devices. The parties generally argue that relocation of facilities currently operating in spectrum identified for unlicensed devices should be handled separately.[19] Most representatives of existing 2 GHz licensees and emerging technology proponents agree that many unlicensed devices, such as personal and household wireless telephones and wireless data systems, will be nomadic in nature and will tend to be moved across geographic regions without regard to potential interference to existing microwave systems.[20] Because of the expected nomadic nature of these devices, the parties generally agree that it is not feasible to consider sharing spectrum between existing fixed microwave facilities and new unlicensed devices sold to the public, and conclude that it will be necessary to clear in its entirety spectrum identified for such devices.[21]

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[19] In the Notice of Proposed Rule Making in GEN Docket No. 90-314, supra note 2 at para. 41-45, the Commission proposed to allocate 1910-1930 MHz for unlicensed PCS devices. Such devices might include advanced cordless phones that are used around the home or office and computer devices that communicate with other computer devices through a local area network.

[20] There may be some unlicensed devices that are not particularly nomadic in nature, such as wireless PBXs, and therefore there may be opportunities for some class of devices to share spectrum with the incumbent fixed microwave operations.

[21] See Apple at 8-10, API at 11-12, Telocator at 13-14, Rolm at 2, Telesis at 1-3, Omnipoint Communications, Inc. (Omnipoint) at 5, and North American Telecommunications Association at 4-9.

20. Proponents argue that to facilitate the introduction of unlicensed devices, the involuntary period for relocation of incumbent licensees should begin immediately upon the effective date of the allocation order. They state that clearing spectrum identified for unlicensed devices will take a significant period of time, and unlike licensed services, such devices cannot begin to be marketed until clearing has been accomplished on a wide scale.[22] Apple Computer, Inc. (Apple) argues that the investment required to develop and implement unlicensed devices will not be made unless there is some assurance of return on that investment and that long delays in gaining access to unencumbered frequencies may have a significant and perhaps irreversible negative effect on the development of unlicensed personal communications services (PCS).[23] Rolm states that a voluntary period of more than one year will be detrimental to the unlicensed PCS industry and that the developers and manufacturers of unlicensed equipment will reevaluate the economic viability of this market if it is encumbered with unreasonable transition times.[24]

21. Even though most licensees of existing fixed microwave operations favor a separate transition framework for spectrum designated for unlicensed devices, they nevertheless argue that there should be a period for voluntary negotiations to facilitate agreements on relocation with incumbent licensees.[25] The Association of American Railroads (AAR) even suggests that the Commission issue a further notice proposing specific details of a plan for unlicensed devices, stating that parties have mentioned establishment of a consortium to facilitate relocation of microwave incumbents.[26]

22. Not all parties support a separate transition plan, however. The Utilities Telecommunications Council (UTC) argues that there is no need to adopt a plan for spectrum identified for unlicensed devices separate from that for licensed services because all new service providers have the same obligation to negotiate and pay for the relocation of incumbent facilities.[27] UTC concludes that a minimum five-year voluntary period should

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[22] See Apple at 8, APC at 8, and Telocator at 13-14.

[23] See Apple Reply at 3.

[24] See Rolm at 3-4.

[25] See API at 11-13 and AAR at 17-18.

[26] See AAR at 17-18 and LCRA Reply at 28; see also note 30, infra.

[27] See UTC at 21-24.

apply for all 2 GHz relocation negotiations, whether for licensed services or unlicensed devices.

23. We conclude that the inherent differences between licensed and unlicensed use of the spectrum require different regulatory treatment. Therefore, we will provide a one year period for negotiations to relocate incumbent fixed microwave facilities operating in spectrum allocated for unlicensed devices. The one year period will commence when an unlicensed equipment supplier or representative initiates a written request for negotiation with a specific licensee. During this period both parties are required to negotiate in good faith over relocation terms and we encourage them to reach voluntary negotiated agreements to relocate incumbent facilities.

24. Our licensing records indicate there are slightly over 400 incumbent facilities licensed in the spectrum proposed for unlicensed devices in the PCS proceeding,[28] of which roughly 20 percent appear to be within the public safety exemption discussed below. We anticipate that it will take at least three years to reach voluntary or involuntary agreements with the existing licensees in this spectrum and to move their facilities.[29] Additional time may be required if more than the proposed 20 megahertz is allocated for use by unlicensed devices. Recognizing that the entire band must be cleared of the incumbents to avoid potential interference before most unlicensed devices may be marketed generally, we believe that mandating a longer voluntary period would unduly lengthen the time before most unlicensed devices could be marketed.

25. We do not believe it necessary to issue a further notice as suggested by AAR, because we have a sufficient record before us in this proceeding to address the general transition framework for unlicensed devices. The specifics of paying for the relocation of incumbent facilities in connection with unlicensed PCS devices, including the possible creation of a consortium, is being addressed in the PCS proceeding, GEN Docket No. 90-314, and may be addressed in future proceedings that address spectrum for other unlicensed devices.[30]

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[28] See the Commission's Master Frequency File for a listing of current assignments in this band.

[29] UTC states that after agreement on details, a reasonable estimate of the time required to complete a single microwave station relocation is 15 months. See UTC at 20-21 and Reply at 29.

[30] On May 14, 1993, the Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management (UTAM) filed with the Commission its "Report and Recommendations," which proposed a

26. As indicated above, we exempted existing 2 GHz fixed microwave operations used for public safety services from involuntary relocation.[31] Apple states that there can be no sharing of frequencies between fixed microwave services and unlicensed PCS devices that are, by design, capable of being used at any location.[32] Therefore, it argues, rather than foreclose operation of unlicensed PCS devices and lose the substantial benefits of the services they provide, the Commission should apply the processes for involuntary relocation to public safety licensees operating in spectrum identified for such devices. Rolm also argues that by exempting a category of microwave users, the Commission has severely handicapped the implementation of unlicensed products and services nationwide.[33] It claims that the exemption may eliminate the benefits of unlicensed devices in certain geographic regions and reduce the market potential for organizations having nationwide interest.

27. We agree with the commenting parties that it may be impractical for fixed microwave licensees to share spectrum with unlicensed devices, and therefore that it may be impractical to protect incumbent public safety licensees in spectrum allocated for such devices. As stated above, we feel it is important, even vital, to provide for unlicensed PCS devices. Therefore, we believe that it is in the best interest of all parties that facilities licensed in this spectrum be relocated. We urge public safety licensees to engage in the negotiation process and to conclude voluntary relocation agreements. If we find that the voluntary relocation process is unsuccessful or is thwarting the general introduction of unlicensed devices in this spectrum, we would reconsider our reliance on voluntary negotiations or even possibly address directly the merits of particular cases.[34]

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method of managing and funding the voluntary relocation of incumbent licensees to facilitate the introduction of unlicensed PCS. The Commission accepted the "Report and Recommendations" as late comments in GEN Docket No. 90-314, supra note 2, and requested comments, see Public Notice, "Comments Invited on Industry Proposal for Unlicensed PCS 2 GHz Transition GEN Docket No. 90-314," May 18, 1993.

[31] See First R&O/Third Notice, supra note 1, at para. 26; paras. 43-52, infra.

[32] See Apple at 5-6.

[33] See Rolm at 2-3.

[34] The one year mandatory negotiation period is that amount of time before the Commission may become involved in resolving a dispute.

28. To facilitate the spectrum being made available for operation of unlicensed devices, Apple proposes that incumbent facilities in any unlicensed band be relocated to another portion of the 2 GHz fixed microwave band if they cannot be moved elsewhere easily.[35] Apple argues this would speed the process of making spectrum available for unlicensed devices. American Personal Communications (APC) and UTC opposed this approach, arguing that relocating to another part of the 2 GHz band might require additional relocation by a new service licensee authorized to use that spectrum.[36] Further, they argue that many of the incumbents that use a channel in the band proposed for unlicensed PCS devices (1910-1930 MHz) do so because other 2 GHz microwave channels are unavailable.

29. We believe that Apple's proposal to relocate incumbent microwave facilities elsewhere within the 2 GHz band has considerable merit with respect to exempted public safety facilities operating in any band identified for unlicensed devices. It should be clear that we urge the operators of such facilities to negotiate voluntarily with providers of emerging technologies and services in the interest of clearing incumbent microwave operations as promptly as possible from any portion of the 2 GHz band allocated for use by unlicensed devices. Especially since public safety facilities are not affirmatively required to relocate, we wish to ensure that they have every possible incentive to relocate voluntarily. Thus, we wish to clarify that the special status of public safety facilities confers a right to remain within the 2 GHz band, but not necessarily at the exact frequency they currently occupy. In some circumstances, it may be possible to move public safety operations to new frequencies within the 2 GHz band at relatively low cost.[37] We do not believe this approach is feasible for other fixed microwave facilities, since in most cases the incumbent licensee could ultimately be required to move to another band. Any intervening relocation would increase the overall cost of relocating the incumbent fixed microwave facilities; it would increase the cost to licensed emerging technology providers by increasing the number of fixed microwave

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[35] See Apple at 7.

[36] See APC at 8-9 and UTC at 24.

[37] We note that in many instances changing to a different frequency within the 2 GHz band may be relatively inexpensive because the existing microwave equipment could be retuned to the new frequency, and the antenna tower and feedline could continue to be utilized. As with the relocation of other incumbents to higher frequency bands, unlicensed emerging technology/PCS service providers will pay fully for the retuning and other costs associated with the modification of the public safety facilities.

facilities that they may have to pay to relocate; and it would burden incumbents with two relocations instead of one. We will, therefore, authorize relocation within the 2 GHz band only of incumbent public safety facilities, and only if an adequate showing is made that such a relocation will not adversely affect the operations of the public safety incumbent, or any other fixed microwave incumbent or emerging technology/PCS licensee.[38]

Use of Government Spectrum for Relocation

30. In the First R&O/Third Notice, we requested comment on the feasibility of using government spectrum for the relocation of existing 2 GHz operations, including whether fixed users operating on frequencies allocated for unlicensed services should be given priority access to government spectrum. We also stated that our staff is working with the National Telecommunications and Information Administration (NTIA) to establish procedures to accommodate in the adjacent government fixed band at 1710-1850 MHz those non-government 2 GHz fixed microwave facilities that technically cannot be accommodated in higher bands. On August 11, 1992, NTIA released a report, "Feasibility of Relocating Non-Government Fixed Systems into the 1710-1850 MHz Band" ("NTIA Feasibility Report") concluding that in the 1710-1850 MHz band there is sufficient spectrum in many areas of the United States to accommodate a limited number of non-government 2 GHz microwave links.[39] NTIA further stated that it will cooperate with the Commission to provide spectrum in the 1710-1850 MHz band for relocating fixed microwave links that cannot operate reliably at 6 GHz, establish technical rules and coordination procedures necessary to identify such links, evaluate the feasibility of relocation in the 1710-1850 MHz band, and if feasible, implement such relocation.[40]

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[38] This approach might be feasible, for example, in areas where only limited PCS service is envisioned, and where the equipment of an incumbent public safety operator is capable of being retuned to a specific portion of the emerging technology/PCS band. Relocation under this procedure into the licensed portion of the 2 GHz emerging technology/PCS band will not be permitted until the licensing process has been completed and the written consent of any emerging technology/PCS licensee obtained.

[39] NTIA Report 92-286. This report was placed in the ET Docket No. 92-9 in August, 1992.

[40] See Letter dated August 11, 1992, from the Assistant Secretary for Communications and Information, U.S. Department of Commerce, to the Chairman of the FCC. This letter accompanied the "NTIA Feasibility Report."

31. All of the commenting parties that address this issue support use of the government band to reaccommodate incumbent fixed microwave facilities.[41] Most state that the government spectrum should be used to accommodate fixed microwave facilities that require long paths that cannot adequately or economically be realized using alternative media or higher frequency fixed microwave bands.[42] Several parties argue that priority should be given to existing 2 GHz public safety facilities or existing 2 GHz facilities that need to be reaccommodated from spectrum allocated for unlicensed devices.[43]

32. As noted above, NTIA has agreed to provide limited, conditional access to government spectrum on a case-by-case basis. The Commission staff is continuing to work with NTIA to make government spectrum available for relocation of existing 2 GHz operations. Further, we believe NTIA will make a good faith effort to accommodate as many of the links recommended for relocation by the Commission as possible. We will request that special consideration be given to reaccommodating links that are technically difficult to accommodate elsewhere; including those that operate in bands allocated for unlicensed services, those of public safety services, and those that require long paths. We believe that this approach will provide a safety net for those licensees operating difficult communications paths.[44]

Comparable Facility Definition and Involuntary Relocation Process

33. In the First R&O/Third Notice we requested comment on defining comparable facilities and on the process to resolve disputes over involuntary relocation, or over comparability of service on new microwave facilities in relocation bands.

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[41] See API at 24-26 and AAR at 10.

[42] See Central and South West Services, Inc. (CSW) at 21-22 and Questar Service Corporation (Questar) at 21-23.

[43] See APC at 8, Apple at 6-7, and Rolm at 3.

[44] We note that pursuant to Public Law 103-66 enacted on August 10, 1993, the Secretary of Commerce must identity and transfer to the Commission not less than 200 megahertz of government spectrum for non-government use. All of the spectrum to be transferred must be below 5 GHz, and one-half must be below 3 GHz; not less than 50 megahertz of the 200 megahertz must be recommended for immediate reallocation within six months of enactment, 25 megahertz of which must be below 3 GHz. While it is possible that spectrum in the 1710-1850 MHz band may be used to satisfy this requirement, it would be premature to base our decision herein on that possibility.

Specifically, we sought comment on the possible use of negotiated rule making for determining definitions of comparability and on dispute resolution alternatives such as mediation and arbitration.

34. Some incumbents argue that comparable facilities must equal or be superior to existing facilities in system reliability, capacity, speed, bandwidth, throughput, overall efficiency, and interference protection.[45] Other definitional means mentioned by parties include comparable facilities as defined by the incumbent licensee, as defined through a negotiated rulemaking, and as defined by a standards body such as the Telecommunications Industry Association.[46]

35. On the other hand, a number of parties, both incumbents and emerging technology providers, oppose an inflexible standard. These parties argue that comparable facilities should be defined on a case-by-case basis by the interested parties, and that differences should be resolved by alternative dispute resolution methods such as mediation or arbitration.[47] They argue that these methods will provide flexibility in negotiations, whereas inflexible standards would impair the process because comparable facilities will be unique for each individual system due to the many variables involved with system design and operation. These parties conclude that defining comparable facilities therefore will have to be developed on a case-by-case basis rather than detailed in regulations.[48]

36. Our goal is to facilitate rapid implementation of new services in the emerging technology bands. We believe that this can be accomplished best by providing flexibility in the relocation process. A number of different design factors will vary in importance in each incumbent's system, and therefore we agree with those parties arguing that adopting an inflexible definition of comparable facilities for general application is inadvisable. Although we decline to adopt a specific definition of comparable facilities and allow the parties in each case to negotiate mutually agreeable terms for determining comparability, in any case brought to the Commission for resolution we will use as our benchmark that comparable facilities must be equal to or superior to existing facilities. To determine comparability we

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[45] See API at 20-21 and AAR at 20.

[46] See AGA at 4, Time Warner at 18-20, and Southwestern Bell Corporation at 2-3.

[47] See Edison Electric Institute (Edison) at 4-5, PCNS at 12-13, USTA at 2-3, and UTC at 3-7.

[48] See, e.g., Southern Natural Gas Company at 4.

would consider, inter alia, system reliability, capability, speed, bandwidth, throughput, overall efficiency, bands authorized for such services, and interference protection.

37. With regard to the alternative dispute resolution process, commenting parties generally agree that such a process would facilitate the voluntary negotiation process but do not agree on selecting mediation or arbitration as methods.[49] Some parties suggest that we could incorporate both mediation and arbitration procedures from the Administrative Dispute Resolution Act (ADRA) to resolve disputes between parties.[50]

38. We agree that disputes resulting from relocation negotiations can be resolved best through individual mediation and arbitration efforts rather than Commission adjudication. This approach is consistent with the Commission's commitment to use alternative dispute resolution (ADR) techniques to expedite and improve our administrative process whenever feasible and consistent with our statutory mandate.[51] Resolution of such disputes entirely by the Commission adjudication processes would be time consuming and costly to all parties. Therefore, we strongly encourage parties unable to voluntarily conclude a relocation agreement to employ ADR techniques.

39. If negotiations are unsuccessful during the periods defined above, the parties may refer the matter to the Commission for resolution. We fully expect that parties coming before the Commission will have clearly defined differences on specific issues, after having engaged in bona fide negotiations that have

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[49] Mediation was supported by API, APPA, and Telocator; arbitration was supported by Associated PCN Company, AAR, Idaho Power, and Rolm. AGA, The Montana Power Company, and Questar stated that disputing parties should choose between the two. Edison and CSW argue that mediation should be used first, followed by binding arbitration if mediation fails.

[50] 5 U.S.C. § 518 et seq. (1992).

[51] See Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party, 6 FCC Rcd 5669 (1991). Information regarding the use of alternative dispute resolution is available from the Commission's Designated ADR Specialist, ADR Program, Office of the General Counsel, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554, Telephone (202) 632-6990, facsimile (202) 632-0149.

included utilizing mediation or arbitration.[52] In resolving disputes, the Commission will take the action it deems appropriate, either on the license of the incumbent or the authority of the emerging technology provider.

Tax Certificates

40. In the First R&O/Third Notice we sought additional comment on employing tax certificates as a means of encouraging fixed microwave operators to relocate.[53] All parties addressing this issue support use of tax certificates for this purpose.[54] U S West, Inc. (U S West) states that while under the Internal Revenue Code the exchange of like kind property ordinarily is not a taxable event, the availability of tax certificates would remove the impact of any uncertainty. Further, U S West argues that issuing tax certificates is appropriate because a certificate simply allows a recipient to defer payment of tax on a gain that the recipient would not have incurred but for the Commission's new policy.[55]

41. U S West argues that the Commission has the legal authority to issue tax certificates because criteria specified by the Internal Revenue Code authorizing the Commission to issue tax certificates in connection with the sale or exchange of property will be met.[56] Namely, the sale or exchange is "necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission;" and the sale or exchange relates to "the ownership and control of a radio broadcasting station," as interpreted by the Commission when it authorized use of tax certificates related to certain cellular radio situations in Telocator Network of America.[57] U S West

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[52] We will presume that the parties have negotiated in good faith if they voluntarily have engaged in mediation or arbitration. Prior to final Commission resolution of a matter referred to it, an incumbent may continue to operate under its current authority.

[53] See First R&O/Third Notice, supra note 1, at para. 37.

[54] See, e.g., Edison at 6, GTE Service Corporation at 8, U S West at 1-8, AGA at 4, Telocator at 15-17, NYNEX Corporation (NYNEX) at 8-9, and U.S. Small Business Administration at 7-8.

[55] See U S West at 3.

[56] See Internal Revenue Code of 1954, 26 U.S.C. §1071.

[57] 58 RR 2d 1443 (1985), recon. dismissed, 1 FCC Rcd 509 (1986).

argues that the first criterion obviously is met. With regard to the second criterion, the Commission previously has used tax certificates in non-broadcast settings and, to its knowledge, the Internal Revenue Service (IRS) has not challenged the Commission's action. The American Gas Association also supports tax certificates, but believes that the Commission may have to obtain approval from the IRS for such a plan.[58]

42. We believe that tax certificates would further our policy of encouraging voluntary agreements to relocate fixed microwave facilities to other bands or other media during the fixed two year period. They would remove the possibility of any financial disincentive to relocate if a 2 GHz fixed user may be deemed to have received a capital gain under the tax laws due to new facilities acquired to implement the relocation. In Telocator, the Commission broadly interpreted its authority to issue tax certificates, as defined in Section 1071 of the IRS Code, to include services other than a radio broadcasting station in order to further the Commission's pro-competitive policies.[59] As in our tax certificate policy to cover certain cellular radio transactions set forth in Telocator, we find it in the public interest to grant tax certificates to incumbent fixed microwave operators to facilitate voluntary agreements during the fixed two year period effectuating our new policy of providing 2 GHz spectrum for emerging technology providers, who will provide competition to existing licensees in other services. Accordingly, we are authorizing the grant of tax certificates for any sale or exchange of property in connection with voluntary agreements for the relocation of fixed microwave facilities during the fixed two year period.

Petitions for Clarification and Reconsideration

43. American Public Power Association (APPA), Apple, Pacific Telesis Group (Telesis), and UTC petitioned for reconsideration or clarification of certain issues resolved in the First R&O.[60] APPA and UTC request clarification of language

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[58] See AGA at 4.

[59] 58 RR 2d at 1450 ("we conclude that the phrase 'radio broadcasting station' is illustrative of the more general congressional intent to facilitate the effectuation of the Commission's policies rather than restrictive, and the scope of the phrase is properly construed as expanding with the extension of the Commission's pro-competitive policies").

[60] See Petitions for Clarification or Reconsideration filed by APPA, Apple, Telesis, and UTC in ET Docket No. 92-9, on November 30, 1992. Apple amended its petition on January 13,

used to describe the class of licensees exempted from involuntary relocation. Specifically, they ask whether non-public safety operations of state and local government licensees are included in the exemption. Apple requests that we hold the transition rules in abeyance until the voluntary negotiation period, standards for comparable alternative facilities, and the dispute resolution process issues have been resolved. Telesis requests that the cost of removal and disposal of existing facilities be included as part of the compensation that emerging technology providers must pay in relocating an incumbent's facilities. It also requests that we provide the option for incumbent fixed microwave licensees to do their own relocation work, if they so desire, and be compensated by the emerging technology provider. UTC requests that we not require incumbent microwave facilities to relocate to non-microwave replacement facilities unless the incumbent agrees to do so. UTC also requests that we clarify that the new facility will be a private communications system owned and controlled by the incumbent microwave licensee and that the incumbent licensee has the right to oversee the engineering, construction, and testing of its microwave replacement facilities.

44. Issues related to timing, the process for determining comparable alternative facilities, and the dispute resolution process all are resolved above, and therefore Apple's request to delay implementation of the transition rules until these matters are resolved is moot.[61] With regard to the petitioners' concerns about costs, oversight, and responsibility relating to replacement facilities, our decision to allow comparable alternative facilities to be defined by the affected parties, as provided above, in the context of a relocation agreement permits the parties to determine who will build and test the new facilities. With regard to removal of existing facilities, the rules require emerging technology licensees to pay all costs

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1993.

[61] Apple also contends that the transition rules adopted in the First R&O violate the Administrative Procedure Act (APA) because the APA requires that substantive rules be published in the Federal Register not less than 30 days before their effective date; yet "material portions of the transition rules have not been published or served because they do not exist." (Apple at 3.) With respect to this argument, Apple has not identified any rule that was improperly made effective less than 30 days after Federal Register publication. The fact that the Commission indicated in the First R&O/Third Notice that it could adopt additional rules in the future does not make the adopted rules invalid.

associated with an involuntary relocation.[62] This includes the cost of removing existing facilities, as well as other types of costs that may be involved in relocation.

45. With regard to type of replacement facilities and ownership, we stated in the First R&O/Third Notice that using fiber optic or satellite facilities are viable alternatives for some systems and encouraged their use where practicable. However, we did not require conversion to alternative media, and have provided sufficient spectrum to accommodate relocation of 2 GHz licensees to higher frequencies.[63] We are not requiring the relocation of an incumbent fixed microwave facility to alternative media. Further, we are not implying that incumbents should cede any ownership or operational responsibility of new replacement microwave facilities.

46. Both APPA and UTC request clarification of the exemption from involuntary relocation. These parties argue that the exemption should apply to all state and local government licensees rather than be limited to strictly public safety organizations.

47. NYNEX Corporation (NYNEX) argues that all local government use of microwave is not for public safety and that the exemption should apply only to essential public safety services. It contends that non-essential uses should be subject to relocation.[64] Omnipoint Communications, Inc. (Omnipoint) also argues that, contrary to UTC's and APPA's assertion in their petitions, it clearly is the Commission's intent to exempt only public safety and emergency service licensees.[65] Omnipoint argues that the Commission's concerns for exempting involuntary relocation were directed primarily to the "economic" burdens that would be placed upon police, fire, and other public safety agencies because unlike public power agencies, they are not revenue-generating entities and rely almost entirely upon budgets derived from taxpayers for their operating funds. Further, APC notes that local government and public safety licensees comprise a large percentage of the incumbents in major markets. It argues that to allow all entities licensed in other services that are eligible as public safety and local government licensees to be exempt from relocation would unjustifiably expand the number of exempt facilities. Finally, a number of parties argue that

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[62] See First R&O/Third Notice, supra note 1, at para. 24.

[63] Id., at para. 19.

[64] See NYNEX at 3-4.

[65] See Omnipoint Communications, Inc. Comment to Petitions for Reconsideration at 3-4.

because it appears that sharing is not possible, particularly between unlicensed devices and fixed microwave operations, public safety licensees should not be exempted from involuntary relocation.[66]

48. On the other hand, a number of existing 2 GHz licensees argue that we should clarify that the exemption includes all local government organizations, including all public power systems.[67] They argue that special economic and operational considerations applicable to public safety licensees apply equally to public power systems. The Public Safety Microwave Committee states that the Commission clearly intended to include all state and local government licensees and the term "public safety" should be defined as it is in Part 90 of the Commission's rules to include local government, police fire, highway maintenance, forestry-conservation, and emergency medical services.[68] Further, UTC states that the Commission's Chief Engineer stated in a letter to Senator Alan Cranston that incumbent state and local government licensees could continue their operations in this band indefinitely on a primary basis.[69] UTC also argues that the Commission should explicitly exempt from mandatory relocation all incumbent licensees that are eligible under the public safety radio service but that are currently licensed under another radio service. These licensees would include state or municipal utilities that hold a license under the industrial radio service. It states that requiring such licensees to amend their station license would appear to impose an inefficient and unnecessary burden on licensees and on the Commission's licensing staff.

49. We agree that the language in the First R&O/Third Notice may not have clearly identified the entities that we intend to exempt from involuntary relocation. Moreover, the Commission's license eligibility standards for private operational fixed microwave licenses allow flexibility in determining under which radio service an entity may be licensed.[70] For example, some entities, such as public utilities owned by state or local governments, are eligible to

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[66] See e.g., Ameritech at 6-7, Apple at 6-7, and Rolm at 2-3.

[67] See LCRA at 10-11, Plains Electric at 1, and UTC at 3.

[68] See Public Safety Microwave Committee Comment to Petition for Clarification and/or Reconsideration at 2.

[69] See UTC Comment on Petitions for Reconsideration/ Clarification at 7-9.

[70] See 47 C.F.R. Part 90.

receive a license under several different services, including the public safety radio service. This understandably has caused confusion.

50. We agree with those parties that suggest that allowing all local government entities such as public power utilities to remain in the band indefinitely will unnecessarily restrict our intent to foster the implementation of services employing new technologies. Our purpose in providing an exemption from mandatory relocation was to ensure that important and essential safety of life and property communications services are not disrupted. As suggested by Omnipoint, our concerns for exempting such facilities from involuntary relocation were directed towards the economic and extraordinary procedural burdens, such as requirements for studies and multiple levels of approvals, that are often necessary to make changes in public safety systems as well as the unique importance of communications involved in the provision of police, fire, and emergency medical services. While our rules ensure that the financial burden of any relocation is placed on the new technology provider, we continue to believe that public safety and special emergency services warrant special protection.

51. At the same time, we agree that the facilities and services that should be afforded such special treatment should be narrowly defined and limited to only those facilities directly used for police, fire, or emergency medical services operations involving safety of life and property. We believe that public safety and special emergency radio service operations that do not meet this criteria do not warrant a special exemption.

52. Accordingly, upon reconsideration we are clarifying that the exemption from involuntary relocation pertains to those Part 94 facilities currently licensed on a primary basis under the eligibility requirements of Section 90.19, Police Radio Service; Section 90.21, Fire Radio Service; Section 90.27, Emergency Medical Radio Service; and Subpart C of Part 90, Special Emergency Radio Services; provided that the majority of communications carried on those facilities are used for police, fire, or emergency medical services operations involving safety of life and property.[71] As an additional safeguard, we will permit current licensees of other Part 94 facilities licensed on a primary basis under the eligibility requirements of Part 90, Subparts B and C, to request similar treatment upon a showing that the majority of the communications carried on those facilities are used for operations involving safety of life and property. As discussed above, we encourage the licensees of all

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[71] To the extent some parties believe we are changing, as opposed to clarifying our earlier decision, we think our decision here is in the public interest for the reasons discussed above.

incumbent facilities, including those of exempt public safety services, to voluntarily negotiate and agree to relocation. The requirements for involuntary relocation adopted above and those adopted in the First R&O/Third Notice ensure that relocated entities will be provided with comparable facilities permitting equivalent communications services at no cost to the existing licensees.

Fixed Microwave Licensing Policy

53. In the First R&O/Third Notice, we affirmed the May 14, 1992 Public Notice issued by our staff that stated the Commission's policy on new fixed microwave use and modifications and expansions by existing microwave licensees of the 2 GHz fixed microwave bands.[72] That policy stated that new 2 GHz fixed facilities will be licensed only on a secondary basis. Existing 2 GHz fixed facilities, licensed before January 16, 1992, are permitted to make modifications and minor extensions and retain their primary status.[73] Major extensions or expansions of existing 2 GHz facilities will be permitted only on a secondary basis, unless a special showing of need is made that justifies primary status.

54. This issue was not raised in the petitions for clarification or reconsideration, but is addressed by a number of the commenting parties. Fixed microwave incumbents oppose allowing expansion only on a secondary basis.[74] They argue that this policy harms existing 2 GHz users with legitimate requirements because incumbent users cannot tolerate harmful interference, and therefore effectively are unable to extend their microwave systems to new or expanded service areas on a secondary basis. On the other hand, our policy on this matter is supported by emerging technology proponents.[75] They argue that there is adequate spectrum above 2 GHz to meet the future requirements of the existing 2 GHz fixed microwave licensees.

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[72] See "2 GHz Licensing Policy Statement," Public Notice, Mimeo No. 23115, May 14, 1992.

[73] This includes facilities licensed on a primary basis in accordance with the May 14, 1992 Public Notice. Acceptable modifications include: minor modifications, changes in antenna azimuth, antenna beamwidth, antenna height, authorized power, channel loading, emission, station location, and ownership or control; reduction in authorized frequencies; or addition of frequencies not in the 2 GHz band.

[74] See API 23-24 and AAR 21-24.

[75] See PCNS at 15-16.

55. We are committed to providing spectrum for the development and growth of new services to the American public. Our policy allows for the continued use of the 2 GHz bands by incumbent licensees until the bands are needed by new services and ensures that other suitable bands are available to meet the requirements of the fixed microwave service. Allowing unrestricted fixed microwave growth in the 2 GHz bands would restrict use of these bands in the future by new services. Therefore, we will continue our policy with regard to the future use of the 2 GHz fixed microwave bands by new or existing fixed microwave licensees.

PROCEDURAL MATTERS

56. Regulatory Flexibility Analysis. The Final Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 608, is contained in Appendix B.

57. Ordering Clauses. Accordingly, IT IS ORDERED, that the petitions for clarification or reconsideration filed by American Public Power Association, Apple Computer, Inc., Pacific Telesis Group, and the Utilities Telecommunications Council ARE GRANTED to the degree stated above and are DENIED in all other respects.

58. Further, IT IS ORDERED, that Parts 21, 22, and 94 of the Commission's Rules and Regulations ARE AMENDED as specified in Appendix A, effective 30 days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 7(a), 303(c), 303(g), and 303(r), of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(c), 303(g), and 303(r).

59. IT IS FURTHER ORDERED, that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A: Final Rules

I. Part 21 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation continues to read as follows:

AUTHORITY: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 410, 602; 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552.

2. Section 21.50 is amended to read as follows:

§ 21.50 Transition of the 2.11-2.13 and 2.16-2.18 GHz bands from Domestic Public Fixed Radio Services to emerging technologies.

* * * * *

(b) Domestic Public Fixed Radio licensees in bands allocated for licensed emerging technology services will maintain primary status in these bands until two years after the Commission commences acceptance of applications for an emerging technology services, and until one year after an emerging technology service licensee initiates negotiations for relocation of the fixed microwave licensee's operations or, in bands allocated for unlicensed emerging technology services, until one year after an emerging technology unlicensed equipment supplier or representative initiates negotiations for relocation of the fixed microwave licensee's operations.

(c) The Commission will amend the operating license of the fixed microwave operator to secondary status only if the following requirements are met:

(1) The service applicant, provider, licensee, or representative using an emerging technology guarantees payment of all relocation costs, including all engineering, equipment, site and FCC fees, as well as any reasonable, additional costs that the relocated fixed microwave licensee might incur as a result of operation in another fixed microwave band or migration to another medium;

(2) The emerging technology service entity completes all activities necessary for implementing the replacement facilities, including engineering and cost analysis of the relocation procedure and, if radio facilities are used, identifying and obtaining, on the incumbents' behalf, new microwave frequencies and frequency coordination; and

(3) The emerging technology service entity builds the replacement system and tests it for comparability with the existing 2 GHz system.

(d) The 2 GHz microwave licensee is not required to relocate until the alternative facilities are available to it for a reasonable time to make adjustments, determine comparability, and ensure a seamless handoff.

(e) If within one year after the relocation to new facilities the 2 GHz microwave licensee demonstrates that the new facilities are not comparable to the former facilities, the emerging technology service entity must remedy the defects or pay to relocate the microwave licensee back to its former or equivalent 2 GHz frequencies.

II. Part 22 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 22.50 is amended to read as follows:

§ 22.50 Transition of the 2.11-2.13 and 2.16-2.18 GHz bands from Public Mobile Service to emerging technologies.

* * * * *

(b) Public Mobile Service licensees in bands allocated for licensed emerging technology services will maintain primary status in these bands until two years after the Commission commences acceptance of applications for an emerging technology service, and until one year after an emerging technology service licensee initiates negotiations for relocation of the fixed microwave licensee's operations or, in bands allocated for unlicensed emerging technology services, until one year after an emerging technology unlicensed equipment supplier or representative initiates negotiations for relocation of the fixed microwave licensee's operations.

(c) The Commission will amend the operating license of the fixed microwave operator to secondary status only if the following requirements are met:

(1) The service applicant, provider, licensee, or representative using an emerging technology guarantees payment of all relocation costs, including all engineering, equipment, site and FCC fees, as well as any reasonable, additional costs that the relocated fixed microwave licensee might incur as a result of operation in another fixed microwave band or migration to another medium;

(2) The emerging technology service entity completes all activities necessary for implementing the replacement facilities, including engineering and cost analysis of the relocation procedure and, if radio facilities are used, identifying and obtaining, on the incumbents' behalf, new microwave frequencies and frequency coordination; and

(3) The emerging technology service entity builds the replacement system and tests it for comparability with the existing 2 GHz system.

(d) The 2 GHz microwave licensee is not required to relocate until the alternative facilities are available to it for a reasonable time to make adjustments, determine comparability, and ensure a seamless handoff.

(e) If within one year after the relocation to new facilities the 2 GHz microwave licensee demonstrates that the new facilities are not comparable to the former facilities, the emerging technology service entity must remedy the defects or pay to relocate the microwave licensee back to its former or equivalent 2 GHz frequencies.

III. Part 94 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 94.59 is amended to read as follows:

§ 94.59 Transition of the 1.85-1.99, 2.13-2.15, and 2.18-2.20 GHz bands from Private Operational-Fixed Microwave Service to emerging technologies.

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(b) Private Operational-Fixed Microwave Service licensees, with the exception of public safety facilities defined in paragraph (f) of this section who will be exempt from any mandatory relocation, in bands allocated for licensed emerging technology services will maintain primary status in these bands until two years after the Commission commences acceptance of applications for an emerging technology service, and until one year after an emerging technology service licensee initiates negotiations for relocation of the fixed microwave licensee's operations or, in bands allocated for unlicensed emerging technology services, until one year after an emerging technology unlicensed equipment supplier or representative initiates negotiations for relocation of the fixed microwave licensee's operations.

(c) The Commission will amend the operating license of the fixed microwave operator to secondary status only if the following requirements are met:

(1) The service applicant, provider, licensee, or representative using an emerging technology guarantees payment of all relocation costs, including all engineering, equipment, site and FCC fees, as well as any reasonable, additional costs that the relocated fixed microwave licensee might incur as a result of operation in another fixed microwave band or migration to another medium;

(2) The emerging technology service entity completes all activities necessary for implementing the replacement facilities, including engineering and cost analysis of the relocation procedure and, if radio facilities are used, identifying and obtaining, on the incumbents' behalf, new microwave frequencies and frequency coordination; and

(3) The emerging technology service entity builds the replacement system and tests it for comparability with the existing 2 GHz system.

(d) The 2 GHz microwave licensee is not required to relocate until the alternative facilities are available to it for a reasonable time to make adjustments, determine comparability, and ensure a seamless handoff.

(e) If within one year after the relocation to new facilities the 2 GHz microwave licensee demonstrates that the new facilities are not comparable to the former facilities, the emerging technology service entity must remedy the defects or pay to relocate the microwave licensee back to its former or equivalent 2 GHz frequencies.

(f) Public safety facilities are not required to be relocated, provided that the majority of communications carried on those facilities are used for police, fire, or emergency medical services operations involving safety of life and property. The facilities within this exception are those Part 94 facilities currently licensed on a primary basis under the eligibility requirements of Section 90.19, Police Radio Service; Section 90.21, Fire Radio Service; Section 90.27, Emergency Medical Radio Service; and Subpart C of Part 90, Special Emergency Radio Services. As an additional safeguard, current licensees of other Part 94 facilities licensed on a primary basis under the eligibility requirements of Part 90, Subparts B and C, are permitted to request similar treatment upon demonstrating that the majority of the communications carried on those facilities are used for operations involving safety of life and property.

Appendix B: Final Regulatory Flexibility Analysis for the Third Report and Order and Memorandum Opinion and Order

Pursuant to 5 U.S.C. Section 603, an initial Regulatory Flexibility Analysis was incorporated in the First Report and Order and Third Notice of Proposed Rule Making (First R&O/Third Notice) in ET Docket No. 92-9. Written comments on the proposals in the First R&O/Third Notice, including the Regulatory Flexibility Analysis, were requested.

A. Need for and Objective of Rules. Our objective is to provide spectrum for the development and implementation of new innovative technologies and services, while preventing disruption to current users of that spectrum. Providing spectrum for emerging technologies is necessary in order to bring new services to the public, and to foster U.S. competitiveness in the global telecommunications marketplace.

B. Issues Raised by the Public in Response to the Initial Analysis. Many parties supported reallocating spectrum to accommodate emerging technologies. Although most suggested modifications to specific proposals set forth in the Third Notice, they did not suggest modifications specifically to the initial regulatory flexibility analysis with the exception of the U.S. Small Business Administration (USSBA).[76] USSBA, while generally supporting the Commission's actions in this proceeding, argues that the Commission should consider requiring the incumbents to pay for their relocation to other bands or alternative media because many of the potential users of the 2 GHz spectrum are small businesses who lack the substantial capital needed to move the incumbents. It claims this will delay or inhibit the development of emerging technologies. Further, it argues that most of the incumbents are large business that recoup their cost through rate regulation and therefore, they would not suffer as their increased cost due to relocation would be absorbed, for the most part, by their customers. USSBA also suggests that tax certificates or deferred payment schedules should be considered as an alternative to reduce the substantial costs faced by small businesses in developing emerging telecommunications technologies.

We are cognizant that the cost to relocate the incumbent facilities is substantial and will to some degree impede both large and small businesses' ability to develop emerging technologies. However, as stated above, the 2 GHz fixed microwave bands support a number of industries that provide vital services to the public; therefore, we are committed to ensuring that the incumbents services are not disrupted and that the economic impact of this proceeding on the incumbents is

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[76] See USSBA at 5-7.

minimized. Further, we must take into consideration that not all of the incumbent licensees are big business, particularly in the bands above 2 GHz, and that many of the licensees are local government entities that are not funded through rate regulation.

We believe that tax certificates would further our policy of encouraging voluntary agreements to relocate fixed microwave facilities to other bands or other media during the two year period. Tax certificates would remove the possibility of any financial disincentive to relocate in instances that a 2 GHz fixed user may be deemed to have received a capital gain under the tax laws due to new facilities acquired to implement the relocation. In Telocator, the Commission broadly interpreted its authority to issue tax certificates, as defined in Section 1071 of the IRS Code, to include services other than a radio broadcasting station in order to further the Commission's pro-competitive policies. As with our tax certificate policy to cover certain cellular radio transactions set forth in Telocator, we find it in the public interest to authorize grant of tax certificates to incumbent fixed microwave operators during the two year period to facilitate voluntary agreements effectuating our new policy of providing 2 GHz spectrum for emerging technology providers. Accordingly, we are authorizing the grant of tax certificates for any sale or exchange of property in connection with voluntary agreements for the relocation of fixed microwave facilities during the two year period.

C. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives. We have reduced burdens wherever possible. The regulatory burdens we have retained are necessary in order to ensure that the public receives the benefits of innovative new services in a prompt and efficient manner. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. The Secretary shall send a copy of this Third Report and Order and Memorandum Opinion and Order to the Chief Counsel for Advocacy of the Small Business Administration.

Separate Statement

of

Commissioner Andrew C. Barrett

RE: Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies [ET Docket 92-9]

This action represents a significant step in our endeavor to authorize Personal Communications Services [PCS] in the United States. I fully support this Order. I believe it represents a balanced effort to accommodate the concerns of fixed microwave licensees in the 2 GHz band. At the same time, the item utilizes the appropriate transition periods to allow PCS licensees to deploy a vast array of new services within a reasonable period of time. Further, our decision to utilize tax certificates as an incentive for relocating fixed microwave users is an excellent policy decision. I believe the tax certificate will enhance our efforts to launch PCS services in this country as quickly as feasible.

Our action today recognizes the great potential for future PCS services, in terms of future economic and business activity, as well as the potential for competitive local exchange services. I encourage PCS proponents and fixed microwave users to cooperate in their negotiations during the transition period. I look forward to addressing the licensing and eligibility issues in our pending PCS docket. We must continue to be vigilant in our effort to authorize PCS services which will unleash the technological and economic potential of the communications industry.

*U.S. Government Printing Office: 1993 — 342-145/80026